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No. (1) 08-824

In The Supreme Court of the United States

JAMES E. PIETRANGELO, II,
Petitioner,

v.

ROBERT M. GATES, Secretary of Defense; MICHAEL CHERTOFF, Secretary of Homeland Security; UNITED STATES OF AMERICA,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether 10 U.S.C. § 654 and its regulatory scheme (collectively "Don't Ask, Don't Tell") violate due process, equal protection, and free speech.

Whether, even in the Military, the prejudice of group A against group B may be a legitimate basis for the government to deny equal benefits to group B. Specifically, whether the prejudice of heterosexual service members against homosexuals is a legitimate basis for the Government to exclude homosexuals from the Military.

Whether the District Court and the Court of Appeals improperly refused to hear plaintiffs' chill/overbreadth claim and their as-applied equal-protection claim.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

A. Introduction 3

B. The Errors By The First Circuit 5

i. "Rule of Law" Replaced By "Rule of Men" 6

ii. "Separate But Equal": Still Wrong Today 11

iii. Perhaps the Most-Breathtakingly-Wide Suppression of Free Speech in American History, Ignored 12

iv. The Court of Appeals Also Completely Ignored Plaintiffs' As-Applied Equal Protection Claim That Homosexuals Are 19

Systematically Abused in the Military

Reasons for Granting the Writ 21

A. The Monstrous Injustice and Farce 21
Must End

B. Courts Currently Interpret Lawrence 24
Divergently, Distorting Constitutional
Jurisprudence

C. A Novel Constitutional Question,..... 26
Which Needs Answering Because of A Split

Conclusion 27

Appendix..... A-i to A-137

First Circuit Panel June 9, 2008
Opinion .....A-1 to A-68

District of Massachusetts April
24, 2006 Opinion .....A-69 to A-121

First Circuit August 8, 2008
Order Denying Rehearing.....A-122 to A-124

District of Massachusetts
September 5, 2006 Order
Denying Reconsideration .....A-125 to A-126

Pietrangelo April 27, 2006
District Court Motion for Reconsideration
(Excerpt)..... A-127 to A-137

TABLE OF AUTHORITIES

Page

CASES:

Bolling v. Sharpe, 347 U.S. 497 (1954) 11

Broadrick v. Oklahoma, 413 U.S. 601 (1973)..... 17

Brown v. Bd. of Education, 347 U.S. 483 (1954) 24

Cohens v. Virginia, 6 Wheat. 264 (1821)..... 20

Conaway v. Deane, 401 Md. 219 (Md. 2007)..... 25

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)..... 18

Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004) 25

Ex parte Morales, 212 S.W.3d 483 (Tex. App. 2006) 25

Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217 (C.D. Cal. 2003) 25

Frontiero v. Richardson, 411 U.S. 677 (1973)..... 12

Garrett v. Tandy Corp., 295 F.3d 94 (1st Cir. 2002) 18

Hudson Valley Black Press v. IRS. 25

307 F. Supp. 2d 543 (S.D.N.Y. 2004)

Lawrence v. Texas, 539 U.S. 558 (2003) 4,25

Lofton v. Sec'y of Dept. of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) 25

Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005) 25

Muth v. Frank, 412 F.3d 808 (7th Cir. 2005) 25

Palmore v. Sidoti, 466 U.S. 429 (1984) 10

Plessy v. Ferguson, 163 U.S. 537 (1896) 11

Romer v. Evans, 517 U.S. 620 (1996) 10,21

Rostker v. Goldberg, 453 U.S. 57 (1981) 10

State v. Clinkenbeard, 123 P.3d 872 (Wash. App. 2005) 25

State v. Limon, 122 P.3d 22 (Kan. 2005) 25

State v. Lowe, 861 N.E.2d 512 (Ohio 2007) 25

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 18

Sylvester v. Fogley, 465 F.3d 851 (8th Cir. 2006) 25

Thomas v. Collins, 323 U.S. 516 (1945) 18

United States v. Extreme Assocs., Inc., ... 25
352 F.Supp.2d 578 (W.D. Pa. 2005)

United States v. Marcum, 60 M.J. 198 26
(U.S. Armed Forces 2004)

Williams v. Att'y Gen. of Ala., 378 F.3d 1232 25
(11th Cir. 2004)

Willowbrook v. Olech, 528 U.S. 562 (2000) 20

Witt v. Dep't of the Air Force, 527 F.3d 806 .. 25,26
(9th Cir. 2008)

AMENDMENTS, STATUTES, & REGULATIONS:

Amend. I, U.S. Const. 2

Amend. V, U.S. Const. 2

10 U.S.C. § 654 ..... *passim*

28 U.S.C. § 1254 1

28 U.S.C. § 1331 1

28 U.S.C. § 1346 1

28 U.S.C. § 2201 1

DOD Directive 1332.14 14,15

DOD Directive 1332.40 14,15

MISCELLANEOUS:

Lizette Alvarez, "Army and Marine Corps..... 21
Grant More Felony Waivers," *The New York Times*,
April 22, 2008

Morris J. MacGregor, Jr., *Integration of the*..... 9
Armed Forces 1940-1965

Duncan Mansfield, "They asked, he told: A..... 15
sergeant's ordeal," *Associated Press*, July 27, 2006

S. Report 103-112..... 15

PETITION FOR A WRIT OF CERTIORARI

James E. Pietrangelo, II respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 528 F.3d 42 (1st Cir. 2008) and reprinted in the Appendix ("A-") at 1 to 68.[1] The opinion of the United States District Court for the District of Massachusetts is reported at 429 F.Supp.2d 385 (D. Mass. 2006) and reprinted at A-69 to A-121.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 2008. The Court of Appeals denied *en banc* review on August 8, 2008. See A-122. On October 22, 2008, Justice Souter extended the time for filing this petition to January 5, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 2201.

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[1]In Petitioner's separate appeal, No. 06-2381, the First Circuit did not issue a separate opinion-cover listing Petitioner as "Appellant." The First Circuit merely entered the same opinion—cover and all—from the companion appeal, No. 06-2313. However, Petitioner was an actual, separate appellant.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides: "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Amend. I, U.S. Const. The Fifth Amendment provides: "No person shall be...deprived of life, liberty, or property, without due process of law." Amend. V, U.S. Const. Title 10, Section 654(b) of the United States Code provides:

> A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations: (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that--(A) such conduct is a departure from the member's usual and customary behavior; (B) such conduct, under all the circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or intimidation; (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the

> armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts. (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. (3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C. § 654(b) (West 1998).

STATEMENT OF THE CASE

I. Introduction

This petition seeks review of an extraordinary decision by a divided panel of the First Circuit that not only recognized bare prejudice as a legitimate state interest but affirmed an obviously unjust and breathtakingly wide system of invidious discrimination and suppression of free speech/assembly/redress equal and akin to racial segregation. Literally and figuratively, the First Circuit panel in one fell swoop replaced "rule of law" with "rule of men."

Despite an exemplary military record, including voluntary deployment to two wars (the Gulf War and the current Iraq War), Petitioner—who had volunteered for a third combat tour—was discharged from the Military in 2004 under 10 U.S.C. § 654 and its regulatory scheme (collectively "Don't Ask, Don't Tell") for being Gay. Along with eleven other Gay service members discharged under Don't Ask, Don't Tell, Petitioner filed suit in 2004 in the U.S. District Court for the District of Massachusetts, challenging the constitutionality of Don't Ask, Don't Tell—particularly in light of this Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003). The suit claimed that Don't Ask, Don't Tell facially and as applied violates due process, equal protection, and free speech. Plaintiffs argued that Lawrence requires Don't Ask, Don't Tell to be evaluated under rational-review-plus or intermediate scrutiny if not strict scrutiny. The District Court dismissed plaintiffs' suit *with prejudice* under Rule 12(b)(6) for failure to state a claim. The District Court held that Don't Ask, Don't Tell implicates no due-process rights; that Don't Ask, Don't Tell implicates equal-protection rights, but only facially; that plaintiffs' free-speech claim was contingent on their equal-protection claim; and that the proper test for their equal-protection claim is rational review. Without defining or factually examining it, the District Court then held that the Government's stated reason for Don't Ask, Don't Tell—"unit cohesion"—satisfies rational review. Petitioner filed a motion for reconsideration,[2]

[2]In which the other plaintiffs joined.

arguing, among other things, that the District Court had completely missed and failed to rule on two of plaintiffs' claims: a second free-speech claim, and a second or as-applied equal-protection claim. The District Court denied the motion, holding that plaintiffs had failed to raise the free-speech claim. Petitioner appealed separately from the other eleven plaintiffs, and the Court of Appeals consolidated the appeals. A divided panel of the Court of Appeals affirmed the dismissal, but upheld Don't Ask, Don't under different reasoning than the District Court. The panel held that Don't Ask, Don't Tell does implicate due-process rights as well as equal-protection rights; that under Lawrence the proper test is rational-review-plus; but nevertheless that the desire to placate heterosexual service members who do not want to serve with homosexual service members—*i.e.*, maintaining "unit cohesion"—satisfies rational-review-plus. Appellants filed for rehearing and hearing *en banc*, which the full Court of Appeals (the panel plus two judges) denied.

II. The Clear and Extraordinary Errors By the First Circuit

The First Circuit's affirmance was clearly erroneous. The First Circuit erroneously held that in the Military Government may give effect to private prejudices and thereby override liberty interests and constitutional equality. The First Circuit also erroneously refused to hold that homosexuals are a suspect class. The First Circuit also erroneously held that plaintiffs had waived their free-speech chill/overbreadth claim. Finally,

the First Circuit erroneously refused to address plaintiffs' equal-protection claim that homosexuals are systematically abused in the Military.

i. "Rule of Law" Replaced by "Rule of Men"

The First Circuit affirmed dismissal of plaintiffs' due-process claim(s) by holding that Congress' finding, that "heterosexual [service members] would prefer not to have somebody [in the Military] of the same sex find them sexually attractive," outweighs homosexual service members' admittedly protected liberty interests in sexual intimacy, marriage, and identity expression. See A-5 to A-6; A-33 to A-37. That is, according to the First Circuit, all homosexual service members may be categorically (even off-duty, off-base, *etc.*) prohibited, upon threat of discharge, from having or trying to have relationships with other consenting homosexual adults (even civilians), from marrying other consenting homosexual adults (even civilians), from admitting that they are homosexual, or from doing anything else that either would let heterosexual service members know that they (the heterosexual service members) are in the midst of homosexual service members or would expose heterosexual service members to non-criminal romantic attention from homosexual service members—lest homophobic heterosexual service members be offended or have to deal with the occasional non-criminal homosexual romantic attention. That is, according to the First Circuit, heterosexual service members—members of a hardened profession like the Military no less—can

professionally deal with members of the opposite sex and with the occasional unwanted non-criminal romantic attention from members of the opposite sex, but they lose all nerve and competence and composure in the presence of homosexuals and when exposed to the occasional unwanted non-criminal romantic attention from members of the same sex, and therefore homosexual service members may at all times and at all places be forcibly bound by celibacy and secrecy.

In other words, the First Circuit held that whatever Congress finds is contrary to the average preference of the majority population in the Military—thus far always white heterosexual males—Congress may prohibit, lest America lose the bulk of its fighting force or have the bulk of its fighting force unhappy and thereby less effective. According to the First Circuit, since Congress found that the average heterosexual in the Military would prefer not to be around (open) homosexuals, homosexuals may be prohibited from enjoying liberty interests—sexual intimacy, marriage, and identity expression—while in the Military. The First Circuit's argument is the famous, or rather infamous, "unit cohesion" argument. Notably, it was first used by Congress, the Judiciary, and the Executive to justify segregation of blacks in the Military up until after the end of World War II. According to the Military's own history, white service members were said on average to prefer not to associate with blacks, and that preference was pandered to:

[Civil rights leaders] flooded the services with redress of black grievances and levied similar demands on the White House, Congress, and the courts. For its part, the Army resisted the demands.... Army officials pointed out that their service had to avoid conflict with prevailing social attitudes, particularly when such attitudes were jealously guarded by Congress.***There would be no racial intermingling in regimental organizations because the practice of separating white and black troops had, the Army staff said, proved satisfactory over a long period of time. To change would destroy morale and impair preparations for national defense. [Citing Memo, TAG for CG's et al., 16 Oct 40, sub: War Department Policy in Regard to Negroes, AG 291.21 (10-9-40) M-A-M.]***Army Chief of Staff George Marshall saw no alternative but to postpone reform.***"The Army is made up of individual citizens of the United States who have pronounced views with respect to the Negro just as they have individual ideas with respect to other matters in their daily walk of life. Military orders, fiat, or dicta, will not change their viewpoints. The Army then cannot be made the means of engendering conflict among the mass of people because of a stand with respect to Negroes which is not compatible with the position attained by the Negro in civil life....***Experiments to meet the wishes and demands of the champions of every race and creed for the solution of their problems are a danger to efficiency, discipline,

> and morale and would result in ultimate defeat." [Quoting Col. Eugene R. Householder, TAGO, Speech Before Conference of Negro Editors and Publishers, 8 Dec 41, AG 291.21 (12-1-41) (1).]

Morris J. MacGregor, Jr., *Integration of the Armed Forces 1940-1965*, Department of the Army Historical Advisory Committee (6 April 1979), part of the Defense Study Series, U.S. Army Center of Military History (1985) (un-paginated internet edition at army.mil/cmhpg/books/integration/IAF-FM.htm). According to the First Circuit's reasoning, then, Congress constitutionally could, today, pass a law excluding from the Military not only homosexuals but blacks—just like during World War II—or Jews or Catholics or Irish or women if Congress found that the Military's majority considered their presence offensive or uncomfortable.

One obvious problem with the First Circuit's holding—aside from its completely absurd premises that all homosexual service members would find all heterosexual service members attractive and act on that attraction and that all heterosexual service members could or would not professionally deal with the occasional non-criminal unwanted homosexual attention as professionally as they deal with non-criminal unwanted heterosexual attention—is that it represents "rule of men" and not "rule of law." It literally endorses bigotry or prejudice—the very antithesis of democracy. It absurdly says that the Military may violate the Constitution—by violating its guarantee of due process, equality, and treatment

based on merit—in order to defend it—by maintaining enough troops who, though themselves bigoted, would fight against other, non-American, bigots. This Court's rulings since the Civil Rights era have made it clear that private or societal prejudice is never a legitimate government interest *anywhere*, even in the Military. In Rostker v. Goldberg, 453 U.S. 57, 78 (1981), this Court categorically said that Congress may not create or maintain "an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic" Military. That proscription obviously precludes excluding individuals from Military service based on third-party prejudice—since the Court in Rostker certainly knew that the Government had, under the theory of unit cohesion, excluded blacks years earlier based on the prejudice of whites. In Palmore v. Sidoti, 466 U.S. 429, 433 (1984), this Court said that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." In Romer v. Evans, 517 U.S. 620, 635 (1996), this Court said that a "bare desire to harm a politically unpopular group cannot constitute a *legitimate* government interest." (Original emphasis; citation omitted) (note that the "harm" referred to in that sentence was a deprivation of Gays of a right possessed by heterosexuals). Gay people should not be denied sexual intimacy, marriage, and identity expression while they are in the Military simply because other Americans dislike or may dislike them and do not want to associate with them.

ii. "Separate But Equal": Still Wrong Today

Similarly, the First Circuit also affirmed dismissal of plaintiffs' equal-protection claim(s), holding that, since homosexuals are not a suspect class, the Government's interest in pandering to heterosexual service members' prejudice against homosexuals allows the Government to exclude homosexuals from the Military and to deny homosexuals liberty interests while in the Military, even though the Government does not so exclude/deny similarly-situated or even identically-situated heterosexuals. See A-40 to A-41. The First Circuit's reasoning is very much like the tautological reasoning employed in Plessy v. Ferguson, 163 U.S. 537 (1896), which upheld racial segregation. Under the infamous "separate but equal" doctrine, blacks could be denied the same transportation as whites received because blacks could be segregated from whites. Under the First Circuit's decision, homosexuals can be denied the same level of Military service as heterosexuals because heterosexuals can discriminate against homosexuals, particularly in the civilian world such as in regard to marriage. In each case, the beginning premise is faulty: that prejudice may be a legitimate government interest motivating a law. Prejudice of heterosexual service members aside, there is no legitimate reason for allowing heterosexuals to serve and live normal lives in the Military but not similarly-situated or identically-situated homosexuals. Don't Ask, Don't Tell thus violates equal protection, see Bolling v. Sharpe, 347 U.S. 497

(1954), as much as due process, and the First Circuit should have struck Don't Ask, Don't Tell down.

Moreover, homosexuals are clearly a suspect class. They undeniably have 1) a shared immutable characteristic (their sexual preference), 2) a history of suffering discrimination, and 3) a lack of political power. See Frontiero v. Richardson, 411 U.S. 677, 685-686 (1973). Thus, the First Circuit should have analyzed plaintiffs' equal-protection challenge to Don't Ask, Don't Tell under strict scrutiny rather than the rational-review-plus which it employed.

iii. Perhaps The Most-Breathtakingly-Wide Suppression of Free Speech in American History, Ignored

As would be expected of a regime born of prejudice, Section 654 and its regulatory scheme have unique provision for preventing or suppressing any possible mention of homosexuality, lest homophobic heterosexual service members (and homophobic heterosexual civilians) be offended in any way and at any time by the notion of homosexuality—which is the true reach of Don't Ask, Don't Tell—and not just in connection with Military effectiveness. In this respect, Section 654 and its regulatory scheme truly resemble the Inquisition which sought to suppress anything that those in power considered "heresy." Section 654 and its regulatory scheme uniquely provide for and allow commanders to consider—in evaluating whether a service member is homosexual and therefore to be discharged—anything that the heterosexual

commanders stereotype or consider, or that heterosexuals in general stereotype or consider, as homosexual or "Gay." For example, Section 654(b) itself directly provides for discharge both for engaging in a "homosexual act," see Section 654(b)(1), which Section 654(f)(3)(B) in part defines as "any bodily contact which *a reasonable person would understand to demonstrate a propensity* or intent to engage in [homosexual bodily contact]," and for stating "*words to the effect*" "that [a service member] is a homosexual or bisexual," see Section 654(b)(2) (emphasis added). The italicized phrases are not defined in the statute or its regulatory scheme. Thus, commanders may consider, as constituting a homosexual act, an innocent hug off-duty between two male service members—under the heterosexual stereotype that "real men don't hug"—or an off-duty statement by a service member that same-sex marriage should be legalized—under the heterosexual stereotype that only homosexuals would support such legalization. For a second example, the Department of Defense Directives (the regulatory scheme part of Don't Ask, Don't Tell) which implement Section 654 as to both enlisted service members and officers state the following with regards to command investigations into whether a service member has committed an actual homosexual act, *i.e.*, whether a service member is an actual homosexual or actually has a propensity to commit homosexual acts:

> In determining whether a [service member] has successfully rebutted the presumption that he or she engages in, attempts to engage

> in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:...Testimony from others about the [member's] *past conduct, character...*;...*Any other evidence relevant to whether the* [*member*] *is likely to engage in homosexual acts*....This list is not exhaustive; *any other relevant evidence may also be considered.*

DOD Directive 1332.14 at para. E3.A1.1.8.1.2.2.; DOD Directive 1332.40 at para. E2.3.1.2. (1997) (emphasis added). Not only are the italicized phrases not defined here either, but the last two italicized phrases clearly tell commanders that homosexuality is whatever they as heterosexuals want or consider it to be if they want to get rid of or are considering getting rid of a service member. It is totally arbitrary. Thus, commanders may consider a service member's off-duty visiting a Gay bar, reading a Gay social magazine such as the *Advocate*, having Gay friends, advocating for Gay rights, or even performing in theater (of all things!) as *corroborating*[3] evidence of homosexuality, under the stereotype that only Gays would do those type of things. As Petitioner cited to both the District Court

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[3]Separately, although prohibited by the Directives, commanders in practice also consider such things—reading Gay literature, having Gay friends, *etc.*—as evidence sufficient to trigger the investigation in the first place, rather than as corroborating evidence once the investigation has been triggered (which is allowed under the Directives). Plaintiffs alleged this practice as part of their as-applied claim, but the lower courts ignored and dismissed it anyway.

and the First Circuit, the Military in investigating one soldier whom it ultimately discharged under Section 654 actually asked him if he had Gay friends and if he was involved in theater, see Duncan Mansfield, "They asked, he told: A sergeant's ordeal," *Associated Press*, July 27, 2006. Moreover, this type of Inquisitorial, McCarthyist witch-hunt is exactly what Congress intended in passing Section 654. See S. Report 103-112 at 292 ("In assessing what is credible information to initiate an inquiry, a commander may consider whether such actions as frequenting gay bars, reading gay literature, or marching in a gay rights parade are non-verbal statements which show a propensity to engage in homosexual acts."). The same DOD Directives just discussed also explicitly state that a statement by a service member that demonstrates a propensity or intent to engage in homosexual acts *is* homosexual conduct and thus grounds for separation. See DOD Directive 1332.14 at paras. E3.A1.1.8.1.1., E3.A4.1.3.4.2., E3.A4.1.3.4.3.; DOD Directive 1332.40 at paras. E2.3., E8.3.4.2., E8.3.4.3. Again, the definition of a statement demonstrating propensity is left to the discretion of commanders.

Because under Section 654 and its regulatory scheme a service member (heterosexual or homosexual) thus may—based on any of a whole vast range of innocent expressive speech and conduct which has nothing directly to do either with being homosexual or with finding heterosexuals attractive but which may be stereotyped by heterosexual commanders or service members as "Gay"—be discharged from the Military and therefore deprived

of his or her livelihood/service and sent back labeled "Gay" to a civilian world prejudiced against homosexuals, service members—both heterosexual and homosexual—avoid or tend to avoid engaging in such expressive speech and conduct or such protected free speech. In particular, service members avoid political speech advocating homosexual rights and causes, even off-duty—especially because nothing inflames homophobic heterosexuals' prejudice like talk of "rights." Heterosexual and homosexual service members also avoid mere assembly with Gays. Section 654 and its regulatory scheme thus have violated and continue to violate free speech (and free assembly and redress) by chilling free speech of service members in general and free speech of the plaintiffs specifically during their tours of duty. Yet, the First Circuit not only refused to even hear this specific free-speech chill/overbreadth claim, it also relegated its refusal to a mere footnote. See A-41 to A-42.

The First Circuit gave several reasons for its refusal, none of which is consistent either with this Court's jurisprudence or with the facts. The First Circuit said that "none of the plaintiffs contend that they were separated from service because they participated in expressive activities." However, the essence of a chill/overbreadth claim is not that a plaintiff was punished for engaging in expressive activities, but that a plaintiff did not engage in expressive activities out of fear of punishment. The First Circuit also ignored Petitioner's argument, see, *e.g.*, Pietrangelo Reply Brief at 37-39, that plaintiffs *also* have representational standing to assert a

chill/overbreadth claim, see Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973) ("Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."). The First Circuit also said that "the explicit terms of the Act do not indicate that such [protected free speech] activities could trigger separation proceedings and the government has stipulated they do not." However, as demonstrated above, the explicit terms of Section 654 and its regulatory scheme clearly *do* indicate that protected free speech activities could trigger separation proceedings, that is, could lead to discharge, either by corroboration or initiation.

The First Circuit also said that plaintiffs had waived a chill/overbreadth claim by failing to raise it before the District Court. However, plaintiffs indisputably *did* raise a chill/overbreadth claim before the District Court. See Complaint at ¶¶ 170 ("Among other things, service members are prohibited by 10 U.S.C. § 654 . . . from making any other statement—whether to other service members or civilians—suggesting a propensity to engage in homosexual acts.***Their ability to associate with persons of their choice is severely restricted."), 168 ("10 U.S.C. § 654, and all regulations issued under it, abridge service members' First Amendment rights"), 171 ("'Don't Ask, Don't Tell'...is unconstitutional on its face, and...as applied to each plaintiff"); Pietrangelo Motion for Reconsideration at A-134 to

A-137 (arguing that the District Court had missed plaintiffs' chill/overbreadth claim and stating what that claim is). Even Judge Saris, in her dissenting panel opinion, recognized that plaintiffs had raised a chill claim before the District Court. See A-63 to A-64. She also noted that every major constitutional law professor in this country had submitted *amicus* briefs as to the First Amendment issue. See *id.* This Court has said that "where the ultimate effect of sustaining a claim of waiver might be an imposition on [First Amendment] rights, we are unwilling to find waiver in circumstances which fall short of being clear and compelling." Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967); see, also, Thomas v. Collins, 323 U.S. 516, 530 (1945). Plaintiffs' chill/overbreadth claim may have been imperfectly presented to the District Court, but it certainly was not waived, *i.e.*, knowingly and voluntarily relinquished, particularly given that at the motion-to-dismiss stage all that plaintiffs had to do was sketch their claim, see Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome....") (citation omitted); Garrett v. Tandy Corp., 295 F.3d 94, 105 (1st Cir. 2002) ("it is enough for a plaintiff to sketch a scenario which, if subsequently fleshed out by means of appropriate facts, could support an actionable claim"), and given that plaintiffs expected the District Court to allow a factual record, especially since every other Court of Appeals to have ruled on Section 654 allowed a factual record. The fact that the First Circuit relied or had to rely on the Government's "stipulation"—a

stipulation not joined in by plaintiffs/appellants and therefore impermissible on a motion to dismiss—as to what the explicit terms of the Act "indicate" shows that a factual record was necessary (and that dismissal was inappropriate).

iv. The Court of Appeals Also Completely Ignored Plaintiffs' As-Applied Equal-Protection Claim That Homosexuals Are *Systematically* Abused in the Military

As has long been infamously known, black service members were not merely segregated in the Military up until after World War II; they were also systematically abused, neglected, and treated arbitrarily during the decades of segregation. The same is true of homosexuals or suspected homosexuals in the Military today and since Don't Ask, Don't Tell's inception. Totally separate from being discharged, and even when not facing discharge at all, homosexual service members or service members suspected of being homosexual have been/are systematically assaulted, harassed, defamed, arbitrarily discriminated against, arbitrarily denied benefits, and otherwise wrongfully harmed with impunity by heterosexual commanders and service members under the auspices of Don't Ask, Don't Tell. Plaintiffs complained of this abuse in an as-applied equal-protection claim. See, *e.g.*, Complaint at ¶¶ 40 ("'Don't Ask, Don't Tell' is applied...unevenly" against women and service members under 25), 49 (Military selectively enforces Don't Ask, Don't Tell), 65 (Military threat to kill Gay

service members), 68 (Military attempt to give one plaintiff a detrimental general discharge based solely on being Gay), 121 (Military harassment of one plaintiff), 124 (Military harassment of another plaintiff), 127 (Military harassment of yet another plaintiff), 158 ("10 U.S.C. § 654, and regulations issued under it, are enforced arbitrarily and capriciously"), 161 ("'Don't Ask, Don't Tell' ...is unconstitutional on its face, and ...as applied to each plaintiff"), 181 and 183 (equal-protection as-applied claim); Pietrangelo Motion for Reconsideration at A-127 to A-133 (arguing that the District Court had missed plaintiffs' as-applied equal protection claim and stating what that claim is). However, the Court of Appeals did not even address the claim or plaintiffs'/appellants' argument that the claim was wrongly dismissed, and the District Court simply said that no as-applied equal protection claim was possible, see A-77 to A-79. That was fundamental error. Federal courts are required to take cognizance of claims over which they have jurisdiction, see Cohens v. Virginia, 6 Wheat. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."), and federal courts certainly have jurisdiction over claims of systematic government abuse of populations. Moreover, an as-applied equal protection claim is *always* possible with regard to a statute, when the Government, acting under the auspices of the statute, is systematically engaging in arbitrary action against individuals covered by the otherwise facially-valid statute and that arbitrary action is only possible because of the statute, see Willowbrook v. Olech, 528

U.S. 562, 564 (2000); Romer v. Evans, 517 U.S. 620, 632 (1996), such as alleged in the Complaint paragraphs mentioned above and discussed in Petitioner's motion for reconsideration.

REASONS FOR GRANTING THE PETITION

I. The Monstrous Injustice And Farce Must Be Ended

Section 654 and its regulatory scheme, collectively "Don't Ask, Don't Tell," smack and smell of the type of various foul and arbitrary government policies which have terribly shamed America and other countries in the world over the last century and a half, including Jim Crow segregation, South African apartheid, the Nuremberg Laws and other anti-Semitic legislation (such as the Nazi ban on Jews serving in the military[4]) of Nazi Germany, and the U.S. internment of Japanese. Don't Ask, Don't Tell is blatantly arbitrary and bigoted and violates the fundamental guiding principal of American Democracy that an individual is to be judged on merit, not immutable, irrelevant characteristic. Indeed, so egregious is Don't Ask, Don't Tell that,

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[4]See Wehrgesetz (Defense Law) v. 21.5.1935 (RGB1 I S. 609). This 1935 Wehrgesetz made Aryanship a pre-requisite for military service. The Wehrgesetz of 1936 expressly stated that no Jew could serve.

It is no coincidence that, like today Americans legally or effectively prohibit military service, marriage, adoption, employment, *etc.*, by Gays, the Nazis decades ago did the same to Jews, and Americans in the 19th and 20th centuries did the same to blacks. The suppression of a minority always has the same hallmarks.

today, someone who is in mediocre physical shape, who has criticized the Military his/her entire life, who has no prior Military experience, who has led a hedonistic life, and who has even been convicted of a felony,[5] may join the Military, as long as s/he is heterosexual, but someone who is in top physical shape, who has supported the Military his/her entire life, who has honorably and efficiently served three tours in the Military already including deployments to two wars, who has led a selfless life, and who has never committed any crime much less a felony, may not join the Military simply because s/he is a known or suspected homosexual (reminiscent of how being a known "Jew" precluded first-class citizenship in Nazi Germany). Don't Ask, Don't Tell also egregiously and cruelly forces homosexual service members to be celibate and secret with regard to their sexuality, so much so that even homosexual service members facing death every day in Iraq and Afghanistan have had to forego expressions of love, support, and comfort to and from their loved ones back home, while their fellow heterosexual service members have not. No other population in America is forced so to be celibate—even hardened criminals are allowed conjugal visits in prison. So egregiously arbitrary is Don't Ask, Don't Tell that it even actually guarantees the type of forced intimacy which proponents of Don't Ask, Don't Tell say it was enacted to prevent. Closeted, even suspected,

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[5]See Lizette Alvarez, "Army and Marine Corps Grant More Felony Waivers," *The New York Times*, April 22, 2008. The felonies for which the Military has granted waivers for enlistment/accession include armed robbery, arson, kidnapping, rape, and child molestation.

homosexual service members actually continue to shower with heterosexual service members, whereas if homosexual service members were allowed to serve openly, they could be segregated for purposes of showering, just as members of the opposite sex now are. So egregiously arbitrary is Don't Ask, Don't Tell that in times of war, such as the current Iraq War—when unit cohesion is at its most critical—the Military has actually suspended or postponed discharge of homosexual service members, and has actually allowed its troops—including its elite special forces—to serve intimately with ally-nation forces which include open homosexuals (because all of our allies allow homosexuals to serve openly).

Don't Ask, Don't Tell's uncanny resemblance to racial segregation and other shameful past policies is why, in America today, ordinary people (homosexual and heterosexual) across the entire spectrum of beliefs and life, including publishers and editors of major newspapers, faculty of major law schools and universities, renowned constitutional law professors, and even former architects and enforcers of Don't Ask, Don't Tell, have called for the statute's repeal. Yet, despite these calls, and despite the fact that the majority of Americans and American *service members* polled today support allowing Gays to openly serve in the Military, Don't Ask, Don't Tell continues as law, and continues to be affirmed by federal courts. The answer why is clear. Congress and the Executive lack the political will at this time to repeal Don't Ask, Don't Tell, and federal courts support Don't Ask, Don't Tell—however blatantly unconstitutional it is—in the absence of a

decision from this Court expressly saying that it is not alright to discriminate against someone simply because s/he is homosexual—just as federal courts supported racial segregation until this Court issued Brown v. Bd. of Education, 347 U.S. 483 (1954). Federal courts simply continue to interpret Lawrence v. Texas, 539 U.S. 558 (2003) as limited to the criminal context.

This Court must end the monstrous injustice and farce that is Don't Ask, Don't Tell. Don't Ask, Don't Tell should not and need not go on. Prejudice cannot be allowed to stand as a legitimate state interest. If the supreme courts of Germany and of the United States had disallowed anti-Semitism and racism when they respectively raised their ugly heads in history, millions of people would probably have been saved or saved suffering.

II. Courts Currently Interpret Lawrence Divergently, Distorting Constitutional Jurisprudence

As the First Circuit itself stated:

> Courts and commentators interpreting Lawrence diverge over the doctrinal approach employed.... Some have read Lawrence to apply a rational basis approach. Others see the case as applying strict scrutiny. And a third group view the case as applying a balancing of state and individual interests that cannot be

characterized as strict scrutiny or rational basis.

A-17 to A-18 (footnote numbers omitted). The Seventh, Eighth, and Eleventh Circuits, as well as several District Courts and state courts, have interpreted Lawrence as applying rational review. See Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005); Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1238 (11th Cir. 2004); Lofton v. Sec'y of Dept. of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005); Conaway v. Deane, 401 Md. 219, 310 (Md. 2007); State v. Lowe, 861 N.E.2d 512, 517 (Ohio 2007); Ex parte Morales, 212 S.W.3d 483, 493 (Tex. App. 2006); State v. Limon, 122 P.3d 22, 29 (Kan. 2005); Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005); State v. Clinkenbeard, 123 P.3d 872, 878 (Wash. App. 2005). The Central District of California, the Southern District of Iowa, and the Southern District of New York—District Courts from sea to shining sea—have interpreted Lawrence as applying strict scrutiny. See Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003); Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), rev'd on other grounds, 405 F.3d 700 (8th Cir. 2005); Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004). The First and Ninth Circuits, as well as the Court of Appeals for the Armed Forces itself, have interpreted Lawrence as applying rational-review-plus. See 528 F.3d at 56; Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008), *reh'g denied*, 06-35644, Order (Dec. 4, 2008);

United States v. Marcum, 60 M.J. 198 (U.S. Armed Forces 2004). Even the District Court in this case did not know what the holding of Lawrence is. See A-85. This divergence and uncertainty distorts constitutional jurisprudence and undermines public confidence in the courts. The Court should hear this case to set the record state on what it meant by and in Lawrence.

III. A Novel Constitutional Question, Which Needs Answering Because of A Split

This Court has never decided the constitutionality of Don't Ask, Don't Tell. At the same time, a split has developed among the Circuits. While all the Circuits except the Ninth Circuit have held that Don't Ask, Don't Tell is categorically constitutional, the Ninth Circuit has held that Don't Ask, Don't Tell is constitutional except under a specific, discrete circumstance which effectively swallows the rule—when the discharge is based on a finding merely that the service member is homosexual (*i.e.*, admittedly has a propensity to engage in homosexual acts), rather than on a finding that the service member is a homosexual *and* actually harmful to unit cohesion beyond just offending someone's homophobic sensibilities. See Witt v. Dep't of the Air Force, 527 F.3d at 821. In other words, the Ninth Circuit has implicitly held Don't Ask, Don't Tell categorically *unconstitutional*—because the Congressional premise of Don't Ask, Don't Tell is that merely being a homosexual (having the propensity) *is* actually harmful to unit cohesion. As far as Congress is

concerned, the excellence of the service of the discharged individual, as well as his or her regard in the unit, is irrelevant. Indeed, Petitioner and the eleven other plaintiffs always contributed to the success of their units and missions—as declared by the Military itself in its numerous awards to, and glowing evaluations of, them—and yet they were still discharged. Thus, if the Military must prove actual harm to unit cohesion, Don't Ask, Don't Tell is basically a dead letter.

This split among Circuits is totally unjust and unfair, and divisive, as it arbitrarily punishes individuals for living in one spot in America versus another. Homosexuals, or suspected homosexuals, in the Ninth Circuit get to keep their jobs as service members, while those outside of the Ninth Circuit do not. The Court's settlement of the constitutionality of Don't Ask, Don't Tell is required to restore rule of law.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be granted. Respectfully,

JAMES E. PIETRANGELO, II

APPENDIX CONTENTS

Page

First Circuit Panel June 9, 2008
Opinion .....A-1 to A-68

District of Massachusetts April 24, 2006
Opinion .....A-69 to A-121

First Circuit August 8, 2008
Order Denying Rehearing.....A-122 to A-124

District of Massachusetts September 5, 2006
Order Denying Reconsideration .....A-125 to A-126

Pietrangelo April 27, 2006
District Court Motion for Reconsideration
(Excerpt) .....A-127 to A-137

United States Court of Appeals
For the First Circuit
Nos. 06-2313, 06-2381
THOMAS COOK; MEGAN DRESCH; LAURA GALABURDA; JACK GLOVER; DAVID HALL; MONICA HILL; JENNY LYNN KOPFSTEIN; JENNIFER MCGINN; JUSTIN PEACOCK; DEREK SPARKS; STACY VASQUEZ, Plaintiffs, Appellants,
JAMES E. PIETRANGELO, II,
Plaintiff, [Appellant,]
v.
ROBERT M. GATES*, Secretary of Defense; MICHAEL CHERTOFF,
Secretary of Homeland Security; UNITED STATES OF AMERICA,
Defendants, Appellees.
APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. George A. O'Toole, Jr., U.S. District Judge]
Before
Howard, Circuit Judge,
Campbell, Senior Circuit Judge
and Saris**, District Judge.

*Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Robert M. Gates is automatically substituted for his predecessor as Secretary of Defense, Donald H. Rumsfeld.

**Of the District of Massachusetts, sitting by designation.

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June 9, 2008

HOWARD, Circuit Judge. In 1993, Congress enacted a statute regulating the service of homosexual persons in the United States military. 10 U.S.C. § 654 (2007)(the Act). The Act, known as "Don't Ask, Don't Tell," provides for the separation of members of the military who engage, attempt to engage, intend to engage, or have a propensity to engage in a homosexual act. Id. § 654(b). In the aftermath of this congressional action, several members of the military brought constitutional challenges, claiming the Act violated the due process and equal protection components of the Fifth Amendment and the free speech clause of the First Amendment. These challenges were rejected in other circuits. See Able v. United States, 155 F.3d 628 (2d Cir. 1998); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Able v. United States, 88 F.3d 1280 (2d Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc).

In 2003, the United States Supreme Court invalidated, on substantive due process grounds, two convictions under a Texas law criminalizing sodomy

between consenting homosexual adults. Lawrence v. Texas, 539 U.S. 558 (2003). Lawrence has reinvigorated the debate over the Act's constitutionality. E.g., Pamela Glazner, Constitutional Doctrine Meets Reality: Don't Ask, Don't Tell in Light of Lawrence v. Texas, 46 Santa Clara L. Rev. 635 (2006); Note, The Military's Ban on Consensual Sodomy in a Post-Lawrence World, 21 Wash. U. J. L. & Pol'y 379 (2006); Jeffrey S. Dietz, Getting Beyond Sodomy: Lawrence and Don't Ask, Don't Tell, 2 Stan. J. C. R. & C. L. 63 (2005). This case is the second post-Lawrence challenge to the Act to be decided by a federal court of appeals.[1]

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[1] The 9th Circuit recently decided Witt v. Dep't of the Air Force, 2008 U.S. App. LEXIS 10794, at *1 (9th Cir. May 21, 2008). In Witt, the plaintiff argued that the Act violated substantive and procedural due process and the Equal Protection Clause. See Id. at *1-2. The district court dismissed the suit under Fed. R. Civ. P. 12(b)(6). Id. at 2. The 9th Circuit reversed the district court's as applied due process rulings, remanding for further proceedings, and affirmed the court's dismissal of the plaintiff's Equal Protection claim. We agree with much of the reasoning set forth in that opinion but also part ways with the 9th Circuit's approach in some significant respects. Most importantly, for reasons that will become apparent, we resolve differently the as applied substantive due process claim brought in this case. We also note that the case before us includes facial challenges to the Act and a First Amendment claim.

I. Statutory and Regulatory Scheme

We begin by summarizing the statutory framework and the accompanying Department of Defense (Department) directives. During the 1992 campaign, President Clinton, preceding his first election, promised to revisit the longstanding Department policy of separating homosexual individuals from military service. After taking office, President Clinton directed the Secretary of Defense to review Department policy, and Congress undertook its own review. As part of the congressional review, then-Chairman of the Joint Chiefs of Staff, Colin Powell, in testimony explicitly adopted by the Senate Armed Services Committee, explained the rationale for the policy of separating certain homosexual members of the military from continued service:

> It is very difficult in a military setting, where you don't get a choice of association, where you don't get a choice of where you live, to introduce a group of individuals who are proud, brave, loyal, good Americans, but who favor a homosexual lifestyle, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity and ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers. I think that this is a very difficult problem to give the military. I think it would be prejudicial to

> good order and discipline to try to integrate that in the current military structure.

S. Rep. No. 103-112 at 283 (1993).

Congress' review culminated in the passage of the Act. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547 § 571, codified at 10 U.S.C. § 654. The Act opens with a series of findings that echo General Powell's concerns: "military life is fundamentally different from civilian life;" "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion;" and "the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." See 10 U.S.C. § 654(a).

To avoid the risk to unit cohesion created by the continued service of those who are likely to engage in a homosexual act, the Act provides that members of the military are subject to separation from service where one of three findings is made: (1) the member has engaged or attempted to engage in a homosexual act;[2] (2) the member has "state[d] that he or she is a homosexual or words to that effect;" or

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[2] Homosexual act means "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desire and any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in [the homosexual act previously described]." 10 U.S.C. § 654 (f)(3).

(3) the member has married or attempted to marry a person known to be of the same biological sex. Id. § 654(b).

If a finding is made that a member of the military has engaged or attempted to engage in a homosexual act, the member may avoid separation by establishing that: (1) the conduct was a departure from the member's usual and customary behavior; (2) such conduct is unlikely to recur; (3) such conduct was not accomplished by use of force, coercion, or intimidation; (4) under the particular circumstances of the case, the member's continued presence in the military is consistent with the interests of the military in proper discipline, good order, and morale; and (5) the member does not have a propensity or intent to engage in a future homosexual act. Id. § 654(b)(1)(A)-(E). Similarly, a member found to have stated, in effect, that he or she is homosexual, may avoid separation by demonstrating "that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in a homosexual act." Id. § 654(b)(2).

Pursuant to authority granted by the Act, the Department issued directives for executing separation proceedings. The directives recite the three reasons under the Act for separation and provide that a member's statement that he or she is a homosexual "creates a rebuttable presumption that the [member] engages in, attempts to engage in, intends to engage in, or has a propensity to engage in a homosexual act." DOD Directive 1332.40 § E2.3 (1997). In considering whether a member has rebutted this

presumption, the military considers: (1) whether the member has engaged in a homosexual act; (2) the member's credibility; (3) testimony from others about the member's past conduct; (4) the nature and circumstances of the member's statement; and (5) any other evidence relevant to whether the member is likely to engage in a homosexual act. Id.

II. The Complaint and Motion to Dismiss

The plaintiffs are twelve former members of the United States military who were separated from service under the Act. The plaintiffs' complaint asserted the following claims: (1) the Act violates the plaintiffs' right to substantive due process on its face and as applied; (2) the Act denies the plaintiffs equal protection of the law on the basis of sexual orientation; and (3) the portion of the Act that triggers separation proceedings based on a member's statement that he or she is homosexual violates the right to freedom of speech.

The government moved to dismiss the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6). The government also contended that the plaintiffs' due process and equal protection claims failed because the Act was subject only to rational basis review, and Congress' "unit cohesion" justification sufficed to sustain the law under this standard as a matter of law. It also argued that the evidentiary use of a member's statement that he or she is homosexual to prove that the member has engaged, intends to engage, or has a propensity to engage in a homosexual act does not abridge First Amendment rights.

III. The District Court Opinion

The district court began its analysis by dispatching with the plaintiffs' as-applied due process challenges. Cook v. Rumsfeld, 429 F. Supp. 2d 385 (D. Mass. 2006). The court ruled that, while the complaint asserted that the plaintiffs were bringing as-applied challenges, in fact, they pleaded no such claims:

> Although the complaint alleges that [the Act] is unconstitutional . . . as it has been particularly applied to each of [the plaintiffs], their legal reasoning . . . make[s] it clear that the constitutional defects they perceive inhere in any application of the policy to homosexual service members, rather than in the particular way the policy might be (or might have been) applied in specific cases. In other words, none of the plaintiffs claim that the policy, if valid in general, was misapplied in his or her particular case to result in separation when a proper application of the policy would have allowed him or her to remain in service. Rather, their objections . . . are that the policy was applied, not how it was applied. This is classically a facial challenge to the statute, and their arguments will be evaluated with that understanding.

Id. at 390 (emphases supplied).

The district court then turned to the plaintiffs' facial challenges, beginning with the due process and equal protection claims. Id. at 391-407. The court

believed that the success of these claims hinged primarily on the level of scrutiny that applies after Lawrence. Id. at 393. The court closely analyzed Lawrence and determined that the Supreme Court employed rational basis review to invalidate the convictions under the Texas law against homosexual sodomy. The court, thus, concluded that Lawrence did not alter the applicability of rational basis review, which had been applied in pre-Lawrence challenges to the Act. Id. at 395-96. The court then determined, in accord with pre-Lawrence authority, that Congress had set forth a rational reason for the statute -- to promote unit cohesion and discipline -- and therefore the facial due process and equal protection claims failed. Id. at 397-406.

Finally, the district court rejected the plaintiffs' First Amendment challenge. Id. at 407-08. The court noted that the Act does not make a member's statement that he or she is a homosexual a basis for separation; rather separation is mandated only where there has been homosexual conduct or a demonstration of a propensity or intent to engage in such conduct. Id. at 407. Based on this understanding, the court concluded that the Act merely provides for the "evidentiary use" of a member's statement regarding sexual orientation and that such use does not violate the First Amendment. Id. at 408. Having concluded that all of the plaintiffs' claims failed as a matter of law, the district court dismissed the complaint with prejudice and entered a final judgment. Id. at 410. The plaintiffs appealed.

IV. Standard of Review

We review a district court's grant of a motion to dismiss de novo, accepting the complaint's well-pleaded facts as true and indulging all reasonable inferences in the plaintiff's favor. SFW Arecibo, Ltd. v. Rodriguez, 415 F.3d 135, 138-39 (1st Cir. 2005). To survive a motion to dismiss, a complaint must allege a "plausible entitlement to relief." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007); Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007). In reviewing a Rule 12(b)(6) dismissal, "we are not wedded to the [district] court's rationale and may affirm an order of dismissal on any basis made apparent from the record." McCloskey v. Mueller, 446 F.3d 262, 266 (1st Cir. 2006).

V. Discussion

On appeal, the plaintiffs challenge all aspects of the district court's ruling. They contend that the district court incorrectly dismissed their substantive due process and equal protection claims because the court misunderstood Lawrence to mandate a rational basis standard of review, rather than some form of heightened judicial scrutiny. In addition, the plaintiffs dispute the district court's ruling that they did not present as-applied due process and equal protection challenges. Finally, they posit that they sufficiently pleaded a First Amendment challenge to the portion of the Act that triggers separation proceeding based on a member's statement of sexual

identity because such a statement is a form of protected speech that is punished by the Act.

A. Due Process

We agree with the parties and the district court that interpreting Lawrence is the critical first step in evaluating the plaintiffs' substantive due process claim. Prior to Lawrence, the courts of appeals, relying on the Supreme Court's holding in Bowers v. Hardwick, 478 U.S. 186 (1986) that homosexuals did not possess a substantive due process interest in engaging in sodomy, considered due process challenges to the Act under rational basis review.[3] See, e.g., Richenberg, 97 F.3d at 260-61; Thomasson, 80 F.3d at 928. But Lawrence overruled Bowers, so the post-Lawrence standard for reviewing a substantive due process challenge to the Act is unclear. Before addressing the district court's conclusion that the rational basis standard continues to apply, we review basic substantive due process principles.

It has long been held that, despite their name, the due process clauses of the Fifth and Fourteenth Amendments "guarantee[] more than fair process." Troxel v. Granville, 530 U.S. 57, 65 (2000). The substantive component of due process "provides

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[3] Where no protected liberty interest is implicated, substantive due process challenges are reviewed under the rational basis standard. See Medeiros v. Vincent, 431 F.3d 25, 33 (1st Cir. 2005). Under this standard, a statute passes constitutional muster so long as the law is rationally related to a legitimate governmental interest. Heller v. Doe, 509 U.S. 312, 320 (1993).

heightened protection against government interference with certain fundamental rights and liberty interests." Washington v. Glucksberg, 521 U.S. 702, 720 (1997). The Supreme Court acts with "caution and restraint" when classifying a particular liberty interest as triggering substantive due process protection, Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977), because classifying an interest as protected by due process to a "great extent, place[s a] matter outside the arena of public debate and legislative action." Glucksberg, 521 U.S. at 720. The Court has recognized that the "Nation's history, legal tradition, and practices provide the crucial guideposts for responsible decisionmaking" in this area. Id. at 721. But it has also recognized that while "history and tradition are the starting point," they are "not in all cases the ending point of the substantive due process inquiry." Lawrence, 539 U.S. at 572.

In Glucksberg, the Supreme Court catalogued the following "liberty interests" as "specially protected" by the due process clause: the right to marry; to have children; to direct the education of one's children; to enjoy marital privacy; to use contraception; to maintain bodily integrity; to choose to have an abortion; and to refuse unwanted medical treatment. Glucksberg, 521 U.S. at 720. The question here is whether Lawrence added to this list an adult's right "to engage in consensual sexual intimacy in the home." Lawrence, 539 U.S. at 567.

In Lawrence, the Court considered a substantive due process challenge to two criminal convictions under a Texas statute criminalizing homosexual sodomy. Id. at 564. The petitioners were

two males who had been arrested for engaging in a sexual act in one of their apartments. Id. at 563. The statute at issue provided that a "person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex."[4] Id. The Lawrence Court characterized the constitutional question as "whether petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause." Id. at 564.

Lawrence addressed this question by considering a line of Supreme Court authority recognizing various due process rights that protect the formation and perpetuation of intimate relationships. Id. at 564. It identified Griswold v. Connecticut, 381 U.S. 479 (1965), as the "pertinent beginning point." Griswold invalidated a law banning the use of contraceptives by married couples because there is due process protection for the realm of privacy implicit in the marital relationship and bedroom. Lawrence, 539 U.S. at 564-65. From there, Lawrence discussed later cases that broadened the interest recognized in Griswold, including Eisenstadt v. Baird, 405 U.S. 438 (1972), which invalidated a ban on contraception use by unmarried people; Roe v. Wade, 410 U.S. 113 (1973), which invalidated a law restricting a woman's right to abort a pregnancy; and Carey v. Population Servs. Int'l, 431 U.S. 678

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[4] The statute defined deviate sexual conduct as "any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object." Tex. Penal Code Ann. § 21.01(1)(2007).

(1977), which struck down a prohibition on the sale of contraception to persons under sixteen years of age. Relying on these precedents, Lawrence concluded that Supreme Court substantive due process precedent establishes protection for "certain decisions regarding sexual conduct [that] extend[] beyond the martial relationship." Lawrence, 539 U.S. at 565.

Lawrence used these precedents as the launching point for its critique of Bowers. In Bowers, the Court rejected a due process challenge to a Georgia statute similar to the one challenged in Lawrence. Lawrence, 539 U.S. at 566. Lawrence criticized Bowers for focusing too narrowly on the "right of homosexuals to engage in sodomy" rather than on the broader right of adults to engage in private, consensual sexual intimacy:

> To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual [in Bowers] put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse. The laws involved in Bowers and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that whether or not entitled to formal recognition

> in law, is within the liberty of persons to choose . . .

Id. at 566-67.

After identifying this analytical flaw in Bowers, the Lawrence Court observed:

> [A]dults may choose to enter [into personal relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id. at 567.

Placing the final nail in Bowers' coffin, the Lawrence Court quoted from Justice Stevens' Bowers dissent that "'individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause. Moreover, this protection extends to intimate choices by unmarried as well as married persons.'" Id. at 578 (quoting Bowers, 478 U.S. at 216 (Stevens, J., dissenting)). In formally overruling Bowers, the Court stated that "Justice Stevens' analysis . . . should have been controlling in Bowers and should control here." Id.

Having dispatched with Bowers, the Court turned to analyze the constitutionality of the convictions under the Texas statute:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention from government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Id. (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).

Courts and commentators interpreting Lawrence diverge over the doctrinal approach

employed to invalidate the petitioners' convictions. Some have read Lawrence to apply a rational basis approach.[5] Others see the case as applying strict scrutiny.[6] And a third group view the case as applying a balancing of state and individual interests that cannot be characterized as strict scrutiny or rational basis.[7] Lawrence's doctrinal

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[5] Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006); Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005); Williams v. Att'y Gen. of Ala., 378 F.3d 1232, 1238 (11th Cir. 2004); Lofton v. Sec'y of Dept. of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004); Witt v. U.S. Dept. of Air Force, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006); United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005); Conaway v. Deane, 401 Md. 219, 310 (Md. 2007); State v. Lowe, 861 N.E.2d 512, 517 (Ohio 2007); Ex parte Morales, 212 S.W.3d 483, 493 (Tex. App. 2006); State v. Limon, 122 P.3d 22, 29 (Kan. 2005); Martin v. Ziherl, 607 S.E.2d 367, 370 (Va. 2005); State v. Clinkenbeard, 123 P.3d 872, 878 (Wash. App. 2005).

[6] Williams, 378 F.3d at 1252 (Barkett, J., dissenting); see Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (including Lawrence within citations of precedent establishing fundamental rights); Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), rev'd on other grounds, 405 F.3d 700 (8th Cir. 2005) (same); Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004) (same); see also Donald H.J. Hermann, Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution, 54 DePaul L. Rev. 909, 969 (2005); Laurence H. Tribe, Lawrence v. Texas: The Fundamental Right that Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1917 (2004).

[7] United States v. Marcum, 60 M.J. 198 (U.S. Armed Forces 2004); Nancy C. Marcus, Beyond Romer and Lawrence: The Right to Privacy Comes out of the Closet, 15 Colum. J. Gender & L. 355 (2006); John G. Culhane, Writing on, Around and Through Lawrence v. Texas, 38 Creighton L. Rev. 493 (2005); Jerald A. Sharum, Comment, Controlling Conduct: The Emerging Protection of Sodomy in the Military, 69 Alb. L. Rev.

approach is "difficult to pin down." Nan D. Hunter, Living with Lawrence, 88 Minn. L. Rev. 1103 (2004). But we are persuaded that Lawrence did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label.

There are at least four reasons for reading Lawrence as recognizing a protected liberty interest. First, Lawrence relies on the following due process cases for doctrinal support: Griswold, Eisentstadt, Roe, Carey, and Casey. 539 U.S. at 565-66. Each case resulted in the Supreme Court recognizing a due process right to make personal decisions related to sexual conduct that mandated the application of heightened judicial scrutiny. Id. It would be strange indeed to interpret Lawrence as not recognizing a protected liberty interest when virtually every case it relied upon for support recognized such an interest.

Second, the language employed throughout Lawrence supports the recognition of a protected liberty interest. Lawrence associated the right at issue with the core constitutional rights of "freedom of thought, belief, and expression," rights which undoubtedly mandate special protection under the Constitution. Id. at 563. It also stated that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Id. at 572 (emphasis

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1195, 1202 (2006); Donald L. Beschle, Lawrence Beyond Gay Rights: Taking the Rationality Requirement for Justifying Criminal Statutes Seriously, 53 Drake L. Rev. 231, 276 (2005).

supplied). And it concluded its analysis by stating that the "right to liberty under the Due Process Clause" allowed the petitioners to engage in "private sexual conduct" because "'[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'" Id. at 578 (quoting Casey, 505 U.S. at 847). Such language strongly suggests that Lawrence identified a protected liberty interest.

Third, in overruling Bowers, Lawrence relied on Justice Stevens' Bowers dissent as stating the controlling principles. Id. at 578. The passage of Justice Stevens' dissent quoted in Lawrence stated that "individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause . . . . Moreover, this protection extends to intimate choices by unmarried as well as married persons." Id. In support of this proposition, Justice Stevens cited Griswold, Eisenstadt and Carey. Bowers, 478 U.S. at 216 (Stevens, J., dissenting). As discussed above, these are due process cases that recognize protected liberty interests. Furthermore, in the very next passage of Justice Stevens' dissent, he described these cases as establishing rights that are "fundamental" and placed the right of adults to engage in private intimate conduct in the same category. Id. It is impossible to read Lawrence as declining to recognize a protected liberty interest without ignoring the Court's statement that Justice Stevens' Bowers dissent was controlling.

Finally, if Lawrence had applied traditional rational basis review (the appropriate standard if no protected liberty interest was at stake, see e.g., Medeiros, 431 F.3d at 33), the convictions under the Texas statute would have been sustained. The governmental interest in prohibiting immoral conduct was the only state interest that Texas offered to justify the statute. Lawrence, 539 U.S. at 582. It is well established that a "legislature [can] legitimately act . . . to protect the societal interest in order and morality." Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973)). Thus, Lawrence's holding can only be squared with the Supreme Court's acknowledgment of morality as a rational basis by concluding that a protected liberty interest was at stake, and therefore a rational basis for the law was not sufficient.

Taking into account the precedent relied on by Lawrence, the tenor of its language, its special reliance on Justice Stevens' Bowers dissent, and its rejection of morality as an adequate basis for the law in question, we are convinced that Lawrence recognized that adults maintain a protected liberty interest to engage in certain "consensual sexual intimacy in the home." The district court, relying on cases from other circuits, read Lawrence as applying rational basis review. We, however, do not find any of the four primary reasons supporting this view persuasive. See Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir. 2005); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815-17 (11th Cir. 2004).

First, the argument has been made that Lawrence nowhere explicitly stated that the right at issue was "fundamental" and therefore the opinion cannot be read as recognizing a fundamental right under the due process clause. See Cook, 429 F. Supp. 2d at 394. While it is true that Lawrence nowhere used the word "fundamental" to describe the interest at stake, there are several Supreme Court cases that have recognized protected liberty interests without using this word. For example, in Washington v. Harper, 494 U.S. 210, 223 (1990), the Supreme Court held that a state prisoner "retains a significant liberty interest" under the due process clause to avoid the unwanted administration of certain drugs. And in Parham v. J.R., 442 U.S. 584, 600 (1979), the Court described a child's "substantial liberty interest" in not being confined unnecessarily for medical treatment. See also Casey, 505 U.S. at 851 (describing the interest as a "protected liberty"); Cruzan v. Director of Mo. Dept. of Health, 497 U.S. 261, 278 (1990) (describing the interest as a "constitutionally protected liberty interest"); Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (describing the interests as "liberty interests"). It is thus clear that the Supreme Court does not always use the word "fundamental" when it wishes to identify an interest protected by substantive due process.

Second, it has been maintained that Lawrence could not have identified a protected liberty interest because the Supreme Court did not engage in a thorough analysis of the "Nation's history and tradition" as required under Glucksberg. Muth, 412 F.3d at 817; Williams, 378 F.3d at 1236; Lofton, 358

F.3d at 816-17. This argument is based on the mistaken premise that the only history relevant to the substantive due process inquiry is a history demonstrating affirmative government action to protect the right in question. But Glucksberg does not establish such a requirement. Lawrence engaged in a thorough historical analysis identifying the lack of a long history of government action to punish the private consensual, intimate conduct of homosexuals. This sort of historical analysis is not inconsistent with Supreme Court precedent in this area. Indeed, if affirmative government action protecting a right were required to trigger substantive due process protection, at least some of the due process cases recognizing a liberty interest would have come out differently because there was no established history of government protection for the right to have an abortion or to use contraception. See Roe, 410 U.S. at 132-41 (reviewing history of abortion law to show that laws restricting abortion are of recent vintage but not showing any history of affirmative government action to protect the right to an abortion); see also Williams, 378 F.3d at 1258-59.

Moreover, to the extent that Lawrence did not adhere to the Glucksberg approach of locating the right to private, consensual adult intimacy in the Nation's history and tradition, it explicitly disavowed the exclusivity of this approach. See Lawrence, 539 U.S. at 572 ("history and tradition are the starting but not in all cases the ending point of the substantive due process inquiry."). In this regard, the Lawrence Court stated:

> [W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

Id. at 571-72. Thus, Lawrence recognized that, in at least some circumstances, the consideration of recent trends and practices is relevant to defining the scope of protected liberty.

Third, it has been suggested that the Lawrence majority's refusal to respond to Justice Scalia's Lawrence dissent, in which he argued that the majority had not recognized a protected liberty interest, indicates that the majority agreed with the dissent's analysis. See Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006). The district court relied heavily on this point, observing that "it might be expected that if [Justice Scalia's dissent] wrongly characterized a principal holding of the case, the majority would have answered and corrected it." Cook, 429 F. Supp. 2d at 394.

This is a possible explanation for the majority's silence, but it is not the only explanation. It is equally possible that the Lawrence majority believed that the text of its opinion stood for itself and that there was little to be gained by debating Justice Scalia on this point. Cf. Cent. Bank of Denver N.A. v. First Interstate Bank of Denver N.A., 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction. . . ."). Given the equally possible, but conflicting,

inferences that can be drawn from the majority's lack of response to Justice Scalia's dissent, we think that there is little to be gleaned about Lawrence's meaning from it.

Finally, it has been claimed that Lawrence's conclusion that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" indicates that Lawrence did not recognize a protected liberty interest. Sylvester, 465 F.3d at 857; Muth, 412 F.3d at 818; Lofton, 358 F.3d at 817 (emphasis supplied). This argument is premised on the notion that the words "legitimate state interest" indicate the application of rational basis review, which is not the proper standard where a protected liberty interest is implicated. As the district court stated, "[t]he use of the appropriate adjective is telltale to constitutional lawyers. If the Lawrence court had been evaluating the constitutionality of the Texas statute under the more exacting standard where fundamental interests are at stake, it would instead have asked whether the state interest was compelling, rather than whether it was legitimate." Cook, 429 F. Supp. 2d at 395.

We take a different view. A law survives rational basis review so long as the law is rationally related to a legitimate governmental interest. E.g., Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992). Rational basis review does not permit consideration of the strength of the individual's interest or the extent of the intrusion on that interest caused by the law; the focus is entirely on the rationality of the state's reason for enacting the law. See Heller v. Doe, 509 U.S. 312, 324 (1993) (a law "fails rational

basis review" only when it "rests on grounds wholly irrelevant to the achievement of the State's objectives" or the State's objectives are themselves invalid). Thus, the argument that Lawrence did not recognize a protected liberty interest because it used the words "legitimate state interest" divorces these word from context -- a context which shows that Lawrence did not employ traditional rational basis review since the Lawrence Court's analysis focused on the individual's liberty interest. This view is supported by Supreme Court cases that have recognized protected liberty interests in the face of "legitimate state interests." Casey, 505 U.S. at 853 (recognizing that even though protected liberty interest was at stake, "the separate States could act in some degree to further their own legitimate interests in protecting prenatal life"); Addington v. Texas, 441 U.S. 418, 425-26 (1979) (balancing the "individual's interest in not being involuntarily confined indefinitely" against the state's "legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves").

To say, as we do, that Lawrence recognized a protected liberty interest for adults to engage in consensual sexual intimacy in the home does not mean that the Court applied strict scrutiny to invalidate the convictions. Several pre-Lawrence cases that have recognized protected liberty interests did not mandate that the challenged law be "narrowly tailored to serve a compelling state interest" -- the strict scrutiny standard. For example, in Sell v. United States, 539 U.S. 166, 179 (2003), the Court recognized a "constitutionally protected

liberty interest [for a criminal defendant] in avoiding the unwanted administration of antipsychotic drugs" and then applied a standard of review less demanding than strict scrutiny by asking whether administering the drugs was "necessary significantly to further important governmental trial-related interests." And similarly, in Casey, 505 U.S. at 877, the Supreme Court reaffirmed a woman's fundamental right to choose to have an abortion but applied the "undue burden" test which balanced the state's legitimate interest in potential human life against the extent of the imposition on the woman's liberty interest. See also Troxel, 530 U.S. at 67-75 (invalidating law burdening due process interest in parental autonomy without applying either rational basis or strict scrutiny); Riggins v. Nevada, 504 U.S. 127, 135-36 (1990) (balancing an individual's interest in refusing psychotropic drugs against the government's interest in trying a competent criminal defendant for a violent crime); Cruzan, 497 U.S. at 278-79 (balancing "protected liberty interest" in refusing unwanted medical treatment against the government interest in promoting life); Harper, 494 U.S. at 223 (weighing a prisoner's interest in refusing drugs against the government's interest in promoting a safe prison environment); Youngberg, 457 U.S. at 320-22 (balancing liberty interest of an individual to avoid bodily restraint against the State's asserted reason for the restraint).

Lawrence is, in our view, another in this line of Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis. In invalidating the convictions,

the Lawrence Court determined that there was no legitimate state interest that was adequate to "justify" the intrusion on liberty worked by the law. 539 U.S. at 578. In other words, Lawrence balanced the strength of the state's asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners' private sexual life caused by the statute in order to determine whether the law was unconstitutionally applied. See Casey, 505 U.S. at 873 ("[N]ot every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right.").

Having defined the nature of the constitutional review mandated by Lawrence, we now consider whether the plaintiffs' facial due process challenge to the Act can survive a motion to dismiss.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [an Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ." United States v. Salerno, 481 U.S. 739, 745 (1987); see also Comfort v. Lynn Sch. Comm., 418 F.3d 1, 12 (1st Cir. 2005) (en banc). The Supreme Court has recently emphasized the limits on facial challenges in the substantive due process context. See Gonzales v. Carhart, 127 S. Ct. 1610, 1639 (2007).

The plaintiffs' facial challenge fails. Lawrence did not identify a protected liberty interest in all forms and manner of sexual intimacy. Lawrence

recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one's home and one's own private life. Lawrence, 539 U.S. at 567. The Court made it abundantly clear that there are many types of sexual activity that are beyond the reach of that opinion. Id., at 578. Here, the Act includes such other types of sexual activity. The Act provides for the separation of a service person who engages in a public homosexual act or who coerces another person to engage in a homosexual act. Both of these forms of conduct are expressly excluded from the liberty interest recognized by Lawrence. Id.

The plaintiffs' as-applied challenge, on the other hand, presents a more difficult question. The plaintiffs point out that the Act could apply to some conduct that falls within the zone of protected liberty identified by Lawrence. The Act, for example, could cover homosexual conduct occurring off base between two consenting adults in the privacy of their home.[8]

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[8] The district court did not reach the merits of the plaintiffs' as-applied due process challenge to the Act. It concluded that, although the plaintiffs tried to plead as-applied challenges, the complaint failed to identify facts showing that the Act was "misapplied" in certain cases. We view differently the necessary factual predicate for an as-applied constitutional challenge to the Act. A claim that the Act was "misapplied" in a particular case is actionable, if at all, under the Administrative Procedures Act. See Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996) (assuming that a review of separation decision under the Act is reviewable under the APA). But this is not the plaintiffs' claim. The plaintiffs allege that, even though the Act was properly administered according to its terms to separate each of them from service, the Act cannot be constitutionally applied in their particular cases because the application unconstitutionally infringes on their

Before addressing the significance of this observation, we pause to recognize the unique context in which the liberty interest at stake in this case arises. We are reviewing an exercise of Congressional judgment in the area of military affairs. The deferential approach courts take when doing so is well-established. Loving v. United States, 517 U.S. 748, 768 (1996) (noting that the Supreme Court gives Congress "the highest deference" in ordering military affairs) (citation omitted); Weiss v. United States, 510 U.S. 163, 177 (1994) (recognizing that the Supreme Court "[adheres] to [the] principle of deference in a variety of contexts [such as] where the constitutional rights of servicemen [are] implicated"); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.").

The Supreme Court has articulated essentially two reasons for this deference. The first

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Lawrence interest. As-applied challenges "'are the basic building blocks of constitutional adjudication'" because they relieve the court of having "to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." Carhart, 127 S. Ct. at 1639. A plaintiff asserts an as-applied challenge by claiming that a statute is unconstitutional as-applied to his or her particular conduct, even though the statute may be valid as to other parties. See Daggett v. Comm'n of Gov. Ethics & Election Practices, 205 F.3d 445, 472 (1st Cir. 2000). The plaintiffs have pleaded classic as-applied challenges here because they claim that the Act is unconstitutional as applied to them, even though the Act may be constitutional as applied to others.

involves institutional competence. The Court has remarked:

> It is difficult to conceive of an area of governmental activity in which courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973); see also N.D. v. United States, 495 U.S. 423, 443 (1990) (noting that where confronted with questions relating to military operations the Court "properly defer[s] to the judgment of those who must lead our Armed Forces in battle").

The second relates to the constitutional power of Congress to "raise and support armies and to make all laws necessary and proper to that end." United States v. O'Brien, 391 U.S. 367, 377 (1968). The Court has described this power as "broad and sweeping," id., and has further noted Congress' accompanying responsibility for "the delicate task of balancing the rights of servicemen against the needs of the military." Solorio v. United States, 488 U.S. 435, 447 (1987).

It is unquestionable that judicial deference to congressional decision-making in the area of military affairs heavily influences the analysis and resolution of constitutional challenges that arise in this context. The Court's examination of the equal protection challenge leveled in Rostker provides an

example. That case concerned a statute that required only males to register for selective service. The lower court had invalidated the statute as unlawful gender discrimination. 453 U.S. at 63. In reversing, the Court focused its analysis entirely on the legislative record that led to Congress' action. The Court discussed, in detail, the process Congress employed in considering the issue, its consultation with all interested parties, its serious consideration of the issues, including the constitutional implications, and its clear articulation of the basis for its decision. Id. at 72-80. The Court then declared the district court's analysis striking down the law "quite wrong" because the district court undertook "an independent evaluation of evidence rather than adopting an appropriately deferential examination of Congress' evaluation of the evidence." Id. at 82-83.

The Court's treatment of First Amendment and Due Process challenges brought in this area similarly manifests this deference to congressional judgment. In Parker v. Levy, 417 U.S. 733 (1974), a case involving vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice, the Court stated that "Congress is permitted to legislate both with greater breadth and with greater flexibility when the statute governs military society." Id. at 755. In Weiss, the Court reemphasized that when dealing with due process challenges "the tests and limitations [associated with those challenges] may differ because of the military

context." 510 U.S. at 177 (citing Rostker, 453 U.S. at 67).[9]

Fully apprised of the constraints on our constitutional inquiry when considering constitutional challenges in the military context, we now examine both the process by which Congress passed the Act and the rationale Congress advanced for it.

Congress' process for developing the Act was involved and it included sustained consideration of the Act's necessity and its impact on constitutional rights. After President Clinton was inaugurated, he directed the Secretary of Defense to submit a draft Executive Order "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Services." Memorandum on Ending Discrimination in the Armed Forces, 1 Pub. Papers 23 (Jan. 29, 1993). The President instructed the Secretary to consult with the military's professional leadership and others concerned with the issue. Id. While this review was in progress, an interim policy was imposed that ended the practice of asking new recruits to confirm that they were heterosexual.

Congress quickly intervened. A few weeks after President Clinton was sworn in, Congress

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[9] Other examples of the deferential approach the Court has taken when analyzing constitutional challenges in the military context include: Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (free exercise of religion); Chappell v. Wallace, 462 U.S. 296, 300-05 (1983) (racial discrimination); Brown v. Glines, 444 U.S. 348, 357-60 (1980) (free expression); Middendorf v. Henry, 425 U.S. 25, 43 (1976) (right to counsel in summary court-martial proceeding). Solorio, 483 U.S. at 448 (collecting cases).

passed a provision calling for a review of the military's approach to homosexuals serving in the military by the Secretary of Defense and the Senate Armed Services Committee. See Pub. L. 103-3 § 601, 107 Stat. 6, 28-29 (1993).

Subsequently, the Department and congressional committees engaged in an exhaustive policy review. The Senate and House Armed Services Committees conducted fourteen days of hearings, heard more than fifty witnesses, and traveled to military facilities to investigate the issue. The Committees heard from witnesses with a wide range of views and various backgrounds, including the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, military and legal experts, enlisted personnel, officers, and public policy activists. See Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103 Cong., 1st Sess. (1993); Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103 Cong., 1st Sess. (1993); Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Servs., 103 Cong., 1st Sess. (1993).

While this congressional review was ongoing, the Department conducted its own review. The Department convened a military working group comprised of senior officers, commissioned a RAND Corporation study, studied the history of the military's response to social change, and consulted legal experts.

In July 1993, President Clinton announced a new policy for the service of homosexuals in the military. Under the policy, applicants for military service would not be asked their sexual orientation but, once inducted into service, a member could be separated for homosexual conduct. 1 Pub. Papers 1111 (July 19, 1993).

A few weeks after the President's announcement, the House and Senate Armed Services Committees proposed to codify the military's policy. The Senate Report, in support of this effort, stated that the Committee was acting only after it had considered "a wide range of experiences, including those of current and former servicemembers who have publicly identified themselves as gay or lesbian" and after having "carefully considered all points of view." S. Rep. 103-112 at 270. Similarly, the House Committee reported that its recommendation was based on "an extensive hearing record as well as full consideration of the extended public debate on this issue . . ." H.R. Rep. 103-200 at 287 (1993) reprinted in 1993 U.S.C.C.A.N 2073 at 2074. The Senate Report also focused explicitly on the effect that the Act could have on constitutional rights of homosexuals, concluding that "if the Supreme Court should reverse its ruling in Bowers and hold that private consensual homosexual acts between adults may not be prosecuted in civilian society, this would not alter the committee's judgment as to the effect of homosexual conduct in the armed forces." S. Rep. 103-112 at 287.

Prior to the enactment of the Act, the full House and Senate debated the measure and

considered floor amendments. In particular, each house rejected amendments that would have permitted the military to develop whatever policy it deemed appropriate and would have allowed the Department to resume asking applicants to state their sexual orientation. 139 Cong. Rec. S11168-11228 (Sept. 9, 1993); 139 Cong. Rec. H7084-86 (Sept. 29, 1993). The Act became law in November 1993, and, as stated earlier, the Act expressly identified its purpose as preserving "high standards of morale, good order and discipline, and unit cohesion" in the military. 10 U.S.C. § 654(a)(15).

The circumstances surrounding the Act's passage lead to the firm conclusion that Congress and the Executive studied the issues intensely and from many angles, including by considering the constitutional rights of gay and lesbian service members. S. Rep. 103-112 at 286-87. Congress ultimately concluded that the voluminous evidentiary record supported adopting a policy of separating certain homosexuals from military service to preserve the "high morale, good order and discipline, and unit cohesion" of the troops.

Acknowledging the government interest identified in this case, one that our deferential posture requires us to take at face value, as-applied challenges to the Act must fail as well. Here, as in Rostker, there is a detailed legislative record concerning Congress' reasons for passing the Act. This record makes plain that Congress concluded, after considered deliberation, that the Act was necessary to preserve the military's effectiveness as a fighting force, 10 U.S.C. § 654(a)(15), and thus, to ensure national security. This is an exceedingly

weighty interest and one that unquestionably surpasses the government interest that was at stake in Lawrence. See Lawrence, 539 U.S. at 585 (O'Connor, J., concurring).

Every as-applied challenge brought by a member of the armed forces against the Act, at its core, implicates this interest. Every member of the armed forces has one fact in common -- at a moment's notice he or she may be deployed to a combat area. 10 U.S.C. § 654(a)(11). The conditions of service in such an area bring into play the animating concerns behind the Act, namely, maintaining the morale and unit cohesion that the military deems essential to an effective fighting force. See 10 U.S.C § 654(a)(12), (15). Accordingly, we have no choice but to dismiss the plaintiffs' as-applied challenge.

To be sure, deference to Congressional judgment in this area does not mean abdication. Rostker, 453 U.S. at 67. But where Congress has articulated a substantial government interest for a law, and where the challenges in question implicate that interest, judicial intrusion is simply not warranted. See id. at 68 ("[W]e must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.").[10]

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[10] In Witt, the 9th Circuit resolved an as-applied, post-Lawrence substantive due process challenge to the Act differently then we do here. 2008 U.S. App. LEXIS 10794, at *36. The 9th Circuit relied on the Supreme Court's pre-Lawrence decision in Sell as a touchstone for its due process inquiry. Id. At 29-30. Although we find Sell instructive in the

B. Equal Protection

In addition to their due process claim, the plaintiffs assert that the Act is unconstitutional under equal protection principles.[11] Unlike the due process claim, which is premised on the constitutional protection afforded all citizens to engage in certain sexual conduct, the equal protection claim is based on the Act's differential treatment of homosexual military members versus heterosexual military members. See generally Erwin Chemerinsky, Constitutional Law: Principles and Policies § 10.1.1 (2d Ed. 2002) (explaining the difference between a due process and an equal protection challenge). The district court rejected this claim under rational basis review.

Under equal protection jurisprudence, a governmental classification aimed at a "suspect class" is subject to heightened judicial scrutiny. See Mills v. State of Me., 118 F.3d 37, 46 (1st Cir. 1997). Classifications that target non-suspect classes are subject only to rational basis review. Id. The plaintiffs contend that the district court erred by applying rational basis review because the Supreme Court's decisions in Romer v. Evans, 517 U.S. 620 (1996), and Lawrence mandate a more demanding standard.

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sense that it illustrates the Supreme Court's application of an intermediate level of scrutiny, we do not find Sell especially helpful in analyzing this statute regulating military affairs.

[11] The Fifth Amendment does not contain an equal protection clause but the due process clause has been interpreted to include an equal protection component. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

In Romer, the Supreme Court invalidated, on equal protection grounds, a Colorado constitutional amendment which prohibited the enactment of any measure designed to protect individuals due to their sexual orientation. The Court analyzed the constitutionality of the amendment through the prism of rational basis, asking whether the classification bore "a rational relation to some legitimate end." Id. at 631. Applying this standard, the Court concluded that the amendment was unconstitutional because the only possible justification for the amendment was "animosity toward the class of persons affected," which does not constitute even "a legitimate governmental interest." Id. at 634-35.

Romer, by its own terms, applied rational basis review. The ground for decision was the notion that where "a law is challenged as a denial of equal protection, and all that the government can come up with in defense of the law is that the people who are hurt by it happen to be irrationally hated or irrationally feared, . . . it is difficult to argue that the law is rational if 'rational' in this setting is to mean anything more than democratic preference." Milner v. Apfel, 148 F.3d 812, 817 (7th Cir. 1998) (Posner, J.). Romer nowhere suggested that the Court recognized a new suspect class. Absent additional guidance from the Supreme Court, we join our sister circuits in declining to read Romer as recognizing homosexuals as a suspect class for equal protection purposes. Scarborough v. Morgan County Bd. of Ed., 470 F.3d 250, 261 (6th Cir. 2006); Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866 (8th Cir. 2006); Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir.

2004); Lofton, 358 F.3d at 818; Veney v. Wyche, 293 F.3d 726, 731-32 (4th Cir. 2002); Holmes, 124 F.3d at 1132.

Lawrence does not alter this conclusion. As discussed earlier, Lawrence was a substantive due process decision that recognized a right in all adults, regardless of sexual orientation, to engage in certain intimate conduct. Indeed, the Lawrence Court explicitly declined to base its ruling on equal protection principles, even though that issue was presented. See Lawrence, 539 U.S. at 574-75. Thus, there is no basis for arguing that Lawrence changed the standard of review applicable to a legislative classification based on sexual orientation.

As neither Romer nor Lawrence mandate heightened scrutiny of the Act because of its classification of homosexuals, the district court was correct to analyze the plaintiffs' equal protection claim under the rational basis standard. As stated earlier, an enactment survives this level of scrutiny so long as the "classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). The plaintiffs maintain that, even under this standard, their claim survives because they will be able to demonstrate that the Act was based on irrational animus and therefore is invalid under Romer. We disagree. Congress has put forward a non-animus based explanation for its decision to pass the Act. Given the substantial deference owed Congress' assessment of the need for the legislation, the Act survives rational basis

review.[12] Able, 155 F.3d at 635-37; Holmes, 124 F.3d at 1132-40; Richenberg, 97 F.3d at 262; Thomasson, 80 F.3d at 292.

In sum, the district court was correct to reject the plaintiffs' equal protection claim because homosexuals are not a suspect class and the legitimate interests Congress put forward are rationally served by the Act.

C. First Amendment

The plaintiffs' final challenge attacks the portion of the Act that subjects a member to possible separation for making a statement identifying himself or herself as a homosexual. The plaintiffs assert that they have adequately stated a claim that this aspect of the Act violates the First Amendment because it subjects a member to separation for stating his or her sexual identity.[13] The plaintiffs

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12 The plaintiffs acknowledge that a conclusion that the Act survives rational basis review defeats their facial and as-applied equal protection challenges.

13 For the first time on appeal, the plaintiffs contend that a wide variety of expressive activities could trigger discharge proceedings. They argue, "A service member might wave a rainbow flag or wear a pink triangle, or he might state that he opposes 'Don't Ask, Don't Tell.' Under § 654 . . . these possibilities and more could force the service member -- whether straight or gay -- into discharge proceedings where he must prove that he has no propensity to engage in homosexual conduct." None of the plaintiffs contend that they were separated from service because they participated in expressive activities. Moreover, the explicit terms of the Act do not indicate that such activities could trigger separation proceedings and the government has stipulated they do not. DOD Directive 1332.414 § E3.A4; DOD Instruction 1332.40 §

maintain that this aspect of the Act is invalid because it restricts the content of the plaintiffs' speech and forces them to pretend that they are heterosexual. There is no question that members of the military are engaging in speech when they state their sexual orientation. See Hurley v. Irish-American Gay & Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 574-75 (1995). There is also no question that First Amendment protections apply to some degree in the military context. See Goldman, 475 U.S. at 503. But "our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Id. This limitation is rooted in the recognition that free expression can sometimes conflict with the military's compelling need to "foster instinctive obedience, unity, commitment, and espirit dc corps" and that "thc essence of military service is the subordination of the desires and interests of the individual to the needs of service." Id. The Act does affect the right of military members to express their sexual orientation by establishing the possibility of adverse consequences from announcing their sexual orientation. But the Act's purpose is not to restrict this kind of speech. Its purpose is to identify those who have engaged or are likely to engage in a homosexual act as defined by the statute. The law is thus aimed at eliminating

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E8. In any event, we decline to reach this newly raised overbreadth argument on appeal. See Brown v. Hot, Sexy & Safer Products, Inc., 68 F.3d 525, 530 (1st Cir. 1995) (stating that an appeal from a motion to dismiss "is not an opportunity to conjure new arguments not raised before the district court.").

certain conduct or the possibility of certain conduct from occurring in the military environment, not at restricting speech. See, e.g., Phillips v. Perry, 106 F.3d 1420, 1430 (9th Cir. 1997); Thomasson, 80 F.3d at 931. The Act relies on a member's speech only because a member's statement that he or she is homosexual will often correlate with a member who has a propensity to engage in a homosexual act. The Supreme Court has held that the First Amendment "does not prohibit the evidentiary use of speech to establish" a claim "or to prove motive or intent." Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993); see also Wayte v. United States, 470 U.S. 598, 612 (1985). As the Fourth Circuit explained in rejecting a challenge identical to the one presented here:

> There is no constitutional impediment, . . . to the use of speech as relevant evidence of facts that may furnish a permissible basis for separation from military service. No First Amendment concern would arise, for instance, from the discharge of service members for declaring that they would refuse to follow orders, or that they were addicted to controlled substances. Such remarks provide evidence of activity that the military may validly proscribe.

Thomasson, 80 F.3d at 931.

We think that the Fourth Circuit has correctly analyzed this claim. To the extent that the Act may be constitutionally applied to circumscribe sexual conduct, the First Amendment does not bar the military from using a member's declaration of

homosexuality as evidence of a violation of the Act. We therefore join the other courts that have rejected First Amendment challenges to the Act on this basis. See Holmes, 124 F.3d at 1136; Able, 88 F.3d at 1300; Thomasson, 80 F.3d at 931.

The plaintiffs argue that, after Lawrence, this analysis is "outmoded." We disagree. The Act does not punish a member for making a statement regarding sexual orientation; separation from service is mandated only because a member has engaged, intends to engage or has a propensity to engage in a homosexual act. This is still a question concerning conduct (or likely conduct); the member's speech continues to have only evidentiary significance in making this conduct-focused determination.

Citing Dawson v. Delaware, 503 U.S. 159 (1992), the plaintiffs also argue that the First Amendment nevertheless limits the kinds of statements that may be used by the government as evidence in an adversary proceeding. In Dawson, the Supreme Court held that the defendant's membership in a white supremacist group could not be introduced against him in a capital sentencing hearing because it violated the defendant's First Amendment right to associate. Id. at 166-68. In reaching this conclusion, the Court emphasized that the admission violated the First Amendment because it had "no bearing on the issue being tried." Id. No similar claim can be made here. A statement by a member that he or she is homosexual is undoubtedly relevant to the kind of conduct a member intends to engage in or has a propensity to engage in. See United States v. Simkanin, 420 F.3d 397, 417-18 (5th Cir. 2005) (concluding that Dawson

did not apply where the defendant's statement was relevant to the issues at sentencing). Therefore, Dawson is inapposite.

Finally, plaintiffs argue that the Act's rebuttable presumption violates their First Amendment rights. The Act's rebuttable presumption works as follows. A military member may be separated from the armed forces if,

> the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in ho mosexual acts.

10 U.S.C. § 654(b)(2) (emphasis added).

The plaintiffs' attack on the rebuttable presumption is twofold. First, they claim that for homosexual military members, the rebuttable presumption is functionally impossible to rebut. Because they are homosexual within the meaning of section 654(f)(1), they cannot prove that they are not homosexual as section 654(b)(2) effectively requires. Second, the plaintiffs argue that even if section 654(b)(2) did offer a presumption capable of being rebutted by homosexual members, the existence of such a presumption "would still force [them] and other gay and lesbian service members to live in an environment that severely restricts and chills

constitutionally protected speech." We deal with each contention in turn.

Each plaintiff has agreed that he or she is a person who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654 (f)(1). Because they admit they fall within section 654(f)(1)'s definition of homosexual, none of them could have proved at a separation proceeding that she or he was not a person who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in" prohibited conduct because, by definition, they are such a person. See id. In that sense, for a military member who is homosexual as defined by 654(f)(1), the rebuttable presumption would be functionally impossible to rebut.

But that does not mean the Act violates the plaintiffs' First Amendment rights. As noted earlier, the government may use a member's statement that he or she is a homosexual as evidence that he or she "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." If a person cannot show otherwise, because in fact he or she does engage in or have such a propensity to engage in homosexual conduct, then the military is entitled to separate that person from the service. The military, in that scenario, is not punishing speech but conduct or propensity to engage in conduct.

Moreover, the contention that it is functionally impossible for a gay member to say "I am homosexual" and then rebut the presumption according to the terms of section 654(b)(2) is inaccurate on its face. A member's personal

definition of "homosexuality" may not be coextensive with the Act's. For example, a person may say he or she is homosexual even though the person does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts. In that scenario, there is a meaningful opportunity to rebut the presumption. The Ninth Circuit's opinion in Holmes provides examples.

> One female Naval officer admitted to her homosexuality but submitted a statement, in which she stated, *inter alia*, that she un derstands the rules against homosexual conduct and intended to obey those rules. Another female Naval officer stated that she was a lesbian but that the statement 'in no way, was meant to imply [] any propensity or intent or desire to engage in prohibited conduct.'

124 F.3d at 1136.

Of course, a situation may arise where a gay member triggers the rebuttable presumption by stating he is gay, proves he is not a person who "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts," and yet is still separated from service. This member would have an administrative challenge available to him. See 5 U.S.C. § 701. No facts have been plead suggesting such a scenario arose in this case.

We now turn to the plaintiffs' alternative argument that the rebuttable presumption, even if capable of being rebutted by homosexual military

members, chills their First Amendment rights. The plaintiffs suggest that the presumption is content based and thus unconstitutional. The Fourth Circuit rejected a similar argument in Thomasson. It observed:

> Whenever a provision prohibits certain acts, it necessarily chills speech that constitutes evidence of the acts. A regulation directed at acts thus inevitably restricts a certain type of speech; this policy is no exception. But effects of this variety do not establish a content-based restriction of speech.

Thomasson, 80 F.3d at 932.

As we explained, the Act's purpose is not to restrict military members from expressing their sexual orientation. Its purpose is to identify those who have engaged in or are likely to engage in a homosexual act. The fact that the Act may, in operation, have the effect of chilling speech does not change the analysis. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (noting that regulation is . . . content-neutral so long as it is "'justified without reference to the content of the regulated speech'" even if it has an "effect on some speakers or messages but not others.") (citation omitted); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). Ultimately, the Act is justified on a content-neutral, nonspeech basis; specifically, maintaining the military's effectiveness as a fighting force. "That the policy may hinge the commencement of administrative proceedings on a

particular type of statement does not convert it into a content based enactment." Thomasson, 80 F.3d at 933.

VI. Conclusion

The constitutional challenges presented in this case are all aimed at a federal statute regulating military affairs. Although the wisdom behind the statute at issue here may be questioned by some, in light of the special deference we grant Congressional decision-making in this area we conclude that the challenges must be dismissed. We **affirm** the judgment of the district court. No costs are awarded.

So ordered.

- Dissenting Opinion Follows -

SARIS, United States District Judge, concurring and dissenting.

I concur with the majority opinion regarding the application of Lawrence to the "Don't Ask, Don't Tell" statute, 10 U.S.C. § 654 (the "Act"). I also concur with the majority's discussion of the plaintiffs' equal protection challenge. However, I respectfully dissent from the discussion of the plaintiffs' claim that 10 U.S.C. § 654(b)(2)[14] violates the First Amendment.

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[14] 10 U.S.C. § 654(b)(2) provides, in relevant part, that: (b) A member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made and approved . . .: (2) That the member has

The military calls the evidentiary presumption created by 10 U.S.C. § 654(b)(2) a "rebuttable" presumption. See Department of Defense ("DoD") Directive No. 1332.14 ¶ E3.A1.1.8.1.2.2 (amended 1994) ("A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.") (emphasis added). Because the plaintiffs dispute that the presumption is rebuttable, I adopt the phrasing used by the Second Circuit, and call the presumption the "statement presumption." See Able v. United States, 88 F.3d 1280, 1283 (2d Cir. 1996).

1. The Claims

Plaintiffs argue that the statement presumption violates the First Amendment in two ways. First, they contend that the presumption is a dead letter in practice because, as applied, "it is functionally impossible for a gay service member to say 'I am gay' and then prove that he has no 'propensity' to engage in homosexual activity, even if the service member could show a track record of celibacy and an honest intent to refrain from

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stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

prohibited conduct." In the plaintiffs' view, the only way to avoid discharge is to recant their sexual orientation. As such, the statement presumption is allegedly used to punish plaintiffs' speech concerning their own status as homosexuals.

Second, the plaintiffs argue that the statement presumption is an unconstitutional allocation of the burden of proof, which chills their own speech as well as a whole range of protected expression by both gay and straight service members. The plaintiffs argue that:

> The provision's burden falls on any speaker whose "[l]anguage or behavior" suggests to "a reasonable person" that the person "intended to convey" that he or she is gay. This broad definition could chill a whole range of protected expression: A service member might wave a rain bow flag or wear a pink triangle, or he might state that he opposes "Don't Ask, Don't Tell." Under § 654's burden-shifting mechanism, these possibilities and more could force the service member -- whether straight or gay -- into discharge proceedings where he must prove that he has no propensity to engage in homosexual conduct.

(internal citations omitted).

2. <u>Content Neutrality</u>

The starting point for the analysis is the difficult question of whether the statement

presumption restricts speech based on its content or viewpoint. I ultimately agree with the majority's position that the statement presumption is content-neutral, but I believe that the issue is a much closer call. "The First Amendment generally prevents government from proscribing speech, or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted). A content-based restriction "can stand only if it satisfies strict scrutiny," and thus is only constitutional if it is "narrowly tailored to promote a compelling Government interest." United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000).

However, "[a] restriction that on its face appears to be content-based, yet serves another purpose that by itself is not speech restrictive, may be constitutionally permitted." Able, 88 F.3d at 1294. Where a restriction does not "fit neatly into either the 'content-based' or 'content-neutral' category," the Supreme Court has held that the speech restriction is content-neutral so long as it is "justified without reference to the content of the regulated speech." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986) (finding zoning ordinance that limits placement of adult theaters content-neutral because it was "aimed not at the content of the films shown . . . but rather at the secondary effects of such theaters on the surrounding community") (emphasis in original).

Even a content-neutral statute, though, must pass First Amendment muster. A content-neutral regulation is permissible:

> [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Wayte v. United States, 470 U.S. 598, 611 (1985) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

The four circuits that addressed the constitutionality of the Act soon after its passage (and before Lawrence)[15] rejected First Amendment challenges to the statement presumption, but they did not fully agree on the appropriate categorization of the First Amendment restriction. In Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996) (en banc), involving a First Amendment challenge to the Act both on its face and as-applied, the Fourth Circuit rejected an argument that the statement presumption suppressed speech on the basis of its content and viewpoint, holding:

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15 A recent post-Lawrence challenge to the statute did not include a First Amendment claim. See Witt v. Dep't of the Air Force, No. 06-35644, 2008 WL 2120501 (9th Cir. May 21, 2008).

> The statute does not target speech declaring homosexuality; rather it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence. The use of speech as evidence in this manner does not raise a constitutional issue –- "the First Amendment ...does not prohibit the evidentiary use of speech to establish the elements of a crime," or, as is the case here, "to prove motive or intent."

Id. at 931 (quoting Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993)). The Fourth Circuit pointed out that service members subject to proceedings under the statement presumption have, in the past, "successfully demonstrated that they lack a propensity or intent to engage in homosexual acts." Id. at 932. The Fourth Circuit relied on opinions from two district courts to demonstrate that some service members had successfully rebutted the presumption of propensity. See Richenberg v. Perry, 909 F. Supp. 1303, 1313 (D. Neb. 1995) (noting that seven service members have successfully rebutted the presumption but not describing the evidence presented), aff'd, 97 F.3d 256 (8th Cir. 1996); Able v. United States, 880 F. Supp. 968, 976 (E.D.N.Y. 1995) (identifying three instances where Navy members had been able to escape discharge, but concluding that these instances were "obviously aberrations that cannot be taken to show that the Act holds out any realistic opportunity to rebut the presumption"), vacated, 88 F.3d 1280, 1298 (2d Cir. 1996) (rejecting the district court's characterization of these cases as

"aberrations" and stating instead that "they demonstrate that the admission of homosexual status does not inevitably equate with a finding of propensity to engage in homosexual acts").

Two circuits similarly held that the Act and its implementing DoD Directives do not target mere status or speech, but seek to identify and exclude those who are likely to engage in homosexual acts. See Richenberg v. Perry, 97 F.3d 256, 263 (8th Cir. 1996) (agreeing with Thomasson); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) (holding brevis that the statement presumption does not violate the First Amendment because the service members were discharged for their conduct and not for their speech).

In a thoughtful opinion, the Second Circuit in Able v. United States, 88 F.3d 1280 (2d Cir. 1996), addressed a facial challenge to the statement presumption claiming that it violated the First Amendment. Assuming, without deciding, that separation of a service member based on status alone would be unconstitutional, id. at 1297 n.10, the Second Circuit discussed whether the statement presumption was content-neutral or content-based. Id. at 1294-96. The court never opted for one label or the other, holding instead that the statement presumption passed constitutional muster under both standards., Id. at 1295-96. The court emphasized that, under United States v. Salerno, 481 U.S. 739, 745 (1987), the plaintiffs failed to show that "no matter how the Act [was] read, it punish[ed] status not conduct." Able, 88 F.3d at 1297. It reasoned:

> Contrary to the district court, we do not believe that, in the context of a facial challenge, we may conclude that the Act equates status with propensity. To be sure, in most cases a member who admits to a homosexual orientation will eventually be separated from the armed forces. But that is because the evidentiary value of the admission is strongly linked to what it is used to prove: a likelihood of engaging in homosexual acts. The plaintiffs cannot prove and the district court cannot credibly maintain that there are no instances in which a person will be retained, despite admitting to a homosexual status, because there is no likelihood that he will engage in such acts. The Directives promulgated by the DoD in accordance with the Act specifically contemplate that such an event may occur. See DoD Directive No. 1332.14, encl. 3, pt. 1, at H.1.b(2).

Id. at 1298.

As the Supreme Court has held, when it is not clear whether a restriction is content-based or content-neutral, the controlling consideration is the governmental purpose in enacting the legislation. Renton, 475 U.S. at 48; see also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Here, the government insists that the purpose of the Act is to target conduct, not status, and points to DoD Directives that limit the Act to only those who engage in or are likely to engage in homosexual conduct. See DoD Directive No. 1332.14 ¶ E2.1.10

(defining "propensity to engage in homosexual acts" to mean "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts") (emphasis added); see also id. at ¶ E3.A1.1.8.1.2.2 (same). In response, the plaintiffs point to the plain terms of the statute, and also to a regulation that states that the statement presumption encompasses "[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity to engage in homosexual acts." Id. at ¶ E2.1.16. According to plaintiffs, given the vagueness of the term "propensity," the statement presumption can be interpreted to reach expressions of mere homosexual status. While the question is close, I conclude that the statement presumption is better viewed as content-neutral because its primary purpose, as set forth by the government, is to target conduct, not speech. But see Thomasson, 80 F.3d at 934 (Luttig, J., concurring) (agreeing with plaintiff that the purpose of Congress in passing the Act was to mandate exclusion of all known homosexuals based on their orientation or status "regardless of whether they have actually engaged in homosexual conduct or are likely to engage in any such conduct"). Thus, under the standard that applies to content-neutral restrictions on speech, the critical remaining inquiries are "(1) whether the statement[] presumption furthers a substantial governmental interest, and (2) whether the statement[] presumption restricts the plaintiffs' speech no more than is essential." Able, 88 F.3d at 1295 (emphasis

added). For the reasons stated by the majority opinion with respect to the plaintiffs' other constitutional claims, the answer to the first of these inquiries is "yes." Accordingly, I now turn to the question of whether the statement presumption, as applied, is overly restrictive of the plaintiffs' speech.

3. Dead Letter

Undaunted by pre-Lawrence case law, the plaintiffs, who all admit they are homosexual within the meaning of Section 654(f)(1),[16] argue that the statement presumption burdens speech more than is essential because, as applied, it is "functionally impossible" to rebut the presumption short of recanting one's status. As such, plaintiffs allege that the statement presumption punishes service members who speak about their constitutionally protected homosexual status by requiring their discharge.

The government disagrees with plaintiffs' dead letter theory that the statement presumption is impossible to rebut in practice. The government

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16 As the majority correctly points out, "[e]ach plaintiff has agreed that he or she is a person who 'engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts,'" as defined under the Act. Yet this concession by the plaintiffs does not end the matter because the plaintiffs also argue that the Act's definition of propensity improperly includes homosexual status. Thus, I do not understand the plaintiffs to be conceding that they could not have rebutted the statement presumption under § 654(b)(2) if, as the government maintains in defending the Act, "propensity" was limited to a likelihood of engaging in prohibited homosexual acts while a service member.

points out that, although the Act broadly defines homosexual conduct to include a "propensity to engage in" homosexual conduct, 10 U.S.C. § 654(f)(1), the implementing DoD Directives narrowly interpret "propensity to engage in" homosexual conduct to mean "more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." DoD Directive No. 1332.14 ¶ E2.1.10 (defining "propensity") (emphasis added); see also id. at ¶ E3.A1.1.8.1.2.2 (same). Accordingly, in the government's view, because a service member's personal definition of "homosexuality" may not coincide with the Act's definition, a service member may be able to successfully rebut the statement presumption if he can show that his statement "I am gay" is not indicative of a likelihood that he will engage in proscribed homosexual conduct.

As several courts have pointed out, the line between "propensity" and "orientation" is razor-thin at best. See, e.g., Able, 880 F. Supp. at 975 (characterizing the distinction between "orientation" and "propensity" as "Orwellian"); Thomasson, 80 F.3d at 941-42 n.8 (Luttig, J., concurring) ("I do not know what homosexual orientation is, if it is not the propensity to commit homosexual acts; indeed, I do not understand how one even knows that he has a homosexual orientation except by realizing that he has a propensity toward the commission of homosexual acts."). Emphasizing that "propensity" sweeps in everyone who is gay, plaintiffs allege that, in practice, gay and lesbian service members are routinely discharged despite evidence that there is no likelihood that they will engage in proscribed

homosexual conduct while they are in military service. Accordingly, plaintiffs contend that any honest admission of a gay or lesbian service member's sexual orientation results in discharge.

In my view, if the Act were applied to punish statements about one's status as a homosexual, it would constitute a content-based speech restriction subject to strict scrutiny. See Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1476-80 (9th Cir. 1994) (in an equal protection challenge to the military's pre-"Don't Ask, Don't Tell" homosexuality policy, construing the policy as only applying to conduct in order to avoid constitutional concerns that would arise if the policy punished service members for "mere propensity" or status alone) (quoting Powell v. Texas, 392 U.S. 514, 543-44 (1968) (Black, J., concurring)). Indeed, as Lawrence articulates, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." Lawrence v. Texas, 539 U.S. 558, 562 (2003); see also Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (stating that the founders "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth").

It is telling that the government does not contend it has a substantial interest, let alone a compelling one, in separating a service member because of his or her status as a homosexual. Rather, the government protests that it is not punishing homosexual status, and insists that it has an interest only in identifying and proscribing homosexual conduct to further its substantial

interest in morale, good order and discipline, and unit cohesion. As proof that the statement presumption is in fact rebuttable, the government highlights opinions, in particular Able and Holmes, that have found that the statement presumption has been successfully rebutted in the past. See Able, 88 F.3d at 1298 ("[A]s the government represented at oral argument without contradiction, in seven cases (out of forty-three attempts), service members have been able to rebut the presumption created by their admission and have been retained."); Holmes, 124 F.3d at 1136 (pointing to several cases, including one where a "female Naval officer admitted to her homosexuality but submitted a statement, in which she stated, inter alia, that she understands the rules against homosexual conduct and intended to obey those rules."). However, in Able, the fact that some service members were successful was held to be sufficient to defeat a facial assault on the statute under the Salerno standard. See Able, 88 F.3d at 1297-98 ("Because plaintiffs have mounted a facial challenge to the Act, they must show that, no matter how the Act is read, it punishes status and not conduct.") (citing Salerno, 481 U.S. at 745). Here, in contrast to Able, plaintiffs mount an as-applied challenge by alleging the presumption is now functionally impossible to rebut short of recanting. Although the government points to cases of the statement presumption being successfully rebutted, the cherry-picked examples are all well over twelve years old: In fact, some 11,000 service members have been discharged under the Act since 1993. On a motion to dismiss, a court "must accept as true all the factual allegations in the complaint,"

Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); accord Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (a court must assume "that all the allegations in the complaint are true (even if doubtful in fact)"), and a court must make all reasonable inferences in the plaintiffs' favor. Clark v. Boscher, 514 F.3d 107, 112 (1st Cir. 2008).

Finally, the government argues that even if the statement presumption is a dead letter in practice, any misapplication of the presumption can be cured by the availability of administrative review. It may be true that an individual service member may prevail in rebutting the presumption on administrative review short of recanting his status, by stating, for example, that he will refrain from engaging in prohibited homosexual conduct. However, the availability of an administrative remedy does not defeat a First Amendment claim that the government is systematically applying the Act in such a way that it unconstitutionally burdens protected speech. See Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures."); see also Able, 88 F.3d at 1289 ("[B]ecause none of the administrative boards before which the plaintiffs would appear has the power to declare the Act unconstitutional, there is no realistic possibility that such proceedings would result in anything other than the plaintiffs' discharge.").

Accordingly, when all reasonable inferences are drawn in their favor, the plaintiffs have alleged a viable cause of action that the burden placed by the government on gay and lesbian service members'

speech is "greater than is essential" to the government's interest in preventing the occurrence of homosexual acts in the military.

4. Chill

Plaintiffs also argue that the statement presumption is an unconstitutional allocation of the burden of proof, which chills a whole range of protected expression.[17] The majority treats the plaintiffs' chill claim as an "overbreadth" claim, although only Appellant Pietrangelo describes the claim in those terms. This designation by the majority is understandable because plaintiffs are unclear as to whether this is a facial challenge, an as-applied challenge, or both. Because the plaintiffs have not expressly raised a facial challenge to the statement presumption, I will treat the claim as an as-applied challenge. The majority is correct to state that "[n]one of the plaintiffs contend that they were

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[17] A group of constitutional law professors submitted an amicus brief in support of this argument. The professors on the brief are Akhil Reed Amar, Southmayd Professor of Law at Yale Law School; C. Edwin Baker, Nicholas F. Gallicchio Professor of Law at the University of Pennsylvania Law School; Erwin Chemerinsky, Alston & Bird Professor of Law and Professor of Political Science at Duke Law School; Owen M. Fiss, Sterling Professor of Law at Yale Law School; Pamela S. Karlan, Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School; Andrew Koppelman, John Paul Stevens Professor of Law at Northwestern Law School; Kathleen M. Sullivan, Stanley Morrison Professor of Law and Former Dean of Stanford Law School; Laurence H. Tribe, Carl M. Loeb University Professor at Harvard Law School; and Tobias Barrington Wolff, Professor of Law at the University of Pennsylvania Law School.

separated from service because they participated in expressive activities." Op. at 41-42 n.13. However, the core of the plaintiffs' as-applied challenge is that they were chilled from engaging in protected speech, not that they were punished for engaging in such speech.

As a preliminary matter, the government has argued that this allocation-of-proof challenge to the statement presumption was not raised before the district court, and is therefore waived. While the plaintiffs raised a chilling argument before the district court, they did not raise this precise argument. However, in a First Amendment case, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995) (internal quotation marks omitted). Accordingly, in my view, in this case involving a First Amendment challenge, plaintiffs' argument that the statement presumption violates the First Amendment because it requires service members to rebut the presumption should not be deemed waived.

The government contends that the DoD Directives and Issuances specifically carve out protected speech, quoting Directives and Issuances that show that the presumption is not triggered by rumors, suspicions, or capricious claims of others, see DoD Directive No. 1332.14 ¶ E3.A4.1.3.3, or by going to a gay or lesbian bar, possessing or reading homosexual publications, associating with gays and lesbians, or marching in a gay rights parade in civilian clothes. See id. ¶ E3.A4.1.3.3.4; see also S.

Rep. No. 103-112, at 292 (1993) ("What the policy recognizes is that heterosexuals, as well as homosexuals, might march in gay rights parades, frequent a gay bar, [and] read gay literature.").

Citing Parker v. Levy, 417 U.S. 733 (1974), the government argues that the military's need for obedience and necessity "may render permissible within the military that which would be constitutionally impermissible outside it." 417 U.S. at 758 (affording deference to regulations applied to an Army doctor who protested Vietnam War and refused to obey orders on base). As the Supreme Court has held, its "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). Moreover, Congress is given the "highest deference" when legislating in the realm of military affairs. Loving v. United States, 517 U.S. 748, 768 (1996); see also Solorio v. United States, 483 U.S. 435, 447 (1987) (noting that Congress has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military").

While judicial deference is "at its apogee" when legislative action regarding military affairs is challenged, "deference does not mean abdication." Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs."). The Supreme Court has struck down restrictions on speech imposed by Congress on First Amendment grounds, even when military matters

were involved. See Schacht v. United States, 398 U.S. 58, 60, 62-63 (1970) (striking down a statutory restriction that allowed the wearing of military uniforms by actors in civilian theatrical productions only when such productions would not "tend to discredit" the military).

The Supreme Court has afforded its strongest deference to the military for speech in military settings. See, e.g., Goldman, 475 U.S. at 507-10 (affording deference to regulation that prevented soldiers from wearing yarmulkes while on duty and in uniform); Brown v. Glines, 444 U.S. 348, 354-55 (1980) (affording deference to regulation that prevented soldiers from circulating petitions on air force bases). Even then, the deference is not absolute. In Brown v. Glines, for example, the Court held that the limitations on on-base petitions "restrict speech no more than is reasonably necessary" because it allowed for alternative channels of protest, such as through the United States mail, and the regulations "specifically prevent commanders from halting the distribution of materials that merely criticize the Government or its policies." 444 U.S. at 355.

The most troubling aspect of the Act's statement presumption is that it covers purely private speech, and public speech made off base and off duty. By its own terms, the Act is "pervasive" in scope, applies "24 hours [a] day," and applies even to speech made "off base" and/or "off duty." See 10 U.S.C. §§ 654(a)(9)-(11). Thus, as alleged in the complaint, the Act required the discharge of some of the plaintiffs based upon strictly private speech, such as confiding in a friend or words within a letter

from a friend or family member. In addition, the amicus brief submitted by the constitutional law professors cites the example of an Arizona state representative who spoke about his homosexuality on the floor of the legislature. After the military discovered the speech through an anonymous complaint and initiated discharge proceedings against the representative, he negotiated a voluntary separation from the Army. See generally Tobias Barrington Wolff, Political Representation and Accountability Under Don't Ask, Don't Tell, 89 Iowa L. Rev. 1633, 1644-50 (2004) (providing examples of the Act's statement presumption being applied to conversations with family members, sessions with chaplains and psychotherapists, and certain public statements).

Plaintiffs argue that the statement presumption, as applied, chills speech because a service member will fear triggering a discharge proceeding, regardless of whether he or she could successfully rebut the presumption. As the Supreme Court explained when striking down a statement presumption in another context, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." Speiser v. Randall, 357 U.S. 513, 526 (1958) (in a due process challenge, invalidating a statute that conditioned a veteran's tax exemption on the signing of an oath disavowing the violent overthrow of the government and that established a rebuttable presumption against eligibility for the exemption if one failed to sign the oath); see also Smith v. California, 361 U.S. 147,

150-51 (1939) (explaining that "the allocation of the burden of proof," like many other legal devices that ordinarily pass constitutional muster, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to use it."). As alleged, the Act's statement presumption chills individual service members from discussing homosexuality both privately and publicly even when they have no intent to engage in prohibited homosexual conduct.

In conclusion, the plaintiffs' burden is a tough one in light of the strong deference owed to Congress and the military seeking to protect unit cohesion. Yet, when all reasonable inferences are drawn in their favor, plaintiffs have made sufficient allegations that the burden that the statement presumption places on speech is greater than is essential, particularly in nonmilitary settings off base and off duty. Thus, I believe that the motion to dismiss should be denied. Because the majority holds otherwise, I respectfully dissent in this very difficult case.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-12546-GAO

THOMAS COOK, MEGAN DRESCH, LAURA GALABURDA,
JACK GLOVER, DAVID HALL, MONICA HILL, JENNY LYNN
KOPFSTEIN, JENNIFER McGINN, JUSTIN PEACOCK, JAMES E.
PIETRANGELO II, DEREK SPARKS, STACY VASQUEZ,
Plaintiffs,

v.

DONALD H. RUMSFELD, Secretary of Defense,
MICHAEL CHERTOFF, Secretary of Homeland Security,
UNITED STATES OF AMERICA,
Defendants.

MEMORANDUM AND ORDER
April 24, 2006

O'TOOLE, D.J.

The plaintiffs are twelve former members of the armed forces of the United States who assert that they were forced to leave the military service involuntarily by reason of the defendants' enforcement of 10 U.S.C. § 654 and regulations adopted pursuant to it. Section 654 and its implementing regulations express what has become

known as the "Don't Ask, Don't Tell" policy of the armed forces, mandating the exclusion from service of persons who either have engaged or attempted to engage in homosexual acts or have effectively identified themselves as homosexual. Claiming that the statute and regulations are unconstitutional, the plaintiffs seek a declaratory judgment to that effect and an injunction against the further enforcement of the policy. They also seek an order requiring their readmission into their respective former service branches, conditioned only on a demonstration of continued eligibility under criteria exclusive of the "Don't Ask, Don't Tell" policy.

The defendants have moved to dismiss the complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P 12(b)(6). Dismissal of a complaint under Rule 12(b)(6) should be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" made in the complaint. Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). In making this determination, a court "assume[s] the truth of all well-pleaded facts and indulge[s] all reasonable inferences that fit the plaintiff's stated theory of liability." Redondo-Borges v. U.S. Dep't of Hous. and Urban Dev., 421 F.3d 1, 5 (1st Cir. 2005) (quoting In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st Cir. 2003)). Those facts may be derived from the complaint, whatever documents are either annexed to it or fairly incorporated into it, and any relevant matters that are susceptible of judicial notice. Id. However, a court need not credit "bald

assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." Id. (quoting Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir.1996)). In short, dismissal of a complaint for failure to state a claim under Rule 12(b)(6) is appropriate where there are dispositive issues of law that bar the plaintiffs' claims even if they are able to prove the factual assertions made in the complaint.

I. Section 654 and the Policy

Prior to January 1993, it had been the long-standing policy of the Department of Defense to discharge (or "separate," to use the term of art) members of the armed services who were homosexuals. See S. Rep. No. 103-112, at 265-67 (1993). Over time the policy had varied in its formulation and administration, but by 1982 it had been codified in Department of Defense Directives 1332.14 (applicable to enlisted personnel) and 1332.30 (applicable to officers). See S. Rep. No. 103-112, at 266-67 (1993). These Directives dealt broadly with the grounds and procedures for separating personnel from service; the 1982 iteration of the Directives explicitly included homosexual acts, or a "propensity" toward them, as a ground for separation.

Shortly after taking office in January 1993, President Clinton directed the Secretary of Defense to review the armed forces' policy regarding the service of homosexuals and to submit a report of his review by July 15, 1993. See Memorandum on Ending Discrimination in the Armed Forces, 1 Pub. Papers 23 (Jan. 29, 1993); see also S. Rep. No. 103-

112, at 267-68 (1993). In the interim, the existing policy was to be enforced, with two qualifications. First, new recruits were not to be asked about homosexuality during the enlistment process (the "don't ask" feature). Second, instead of being fully separated, service members who were homosexual would simply be removed from active duty and placed in non-pay status in the standby reserve, so long as they had not engaged in homosexual acts. See S. Rep. No. 103-112, at 267-68 (1993). On July 19, 1993, after completing the review requested by the President, the Secretary of Defense issued a policy memorandum which effectively extended the interim policy for a few more months. See Remarks Announcing the New Policy on Homosexuals in the Military, 1 Pub. Papers 1109 (July 19, 1993); see also S. Rep. No. 103-112, at 289-92 (1993).

Congress also undertook a review of the existing policy in early 1993. The Armed Services Committees of both the Senate and the House of Representatives held hearings on the matter through the spring and summer of that year. See S. Rep. No 103-112, at 268-70 (1993); H.R. Rep. No. 103-200, at 286-90 (1993); see also Thomasson v. Perry, 80 F.3d 915, 921-23 (4th Cir. 1996) (recounting in detail the legislative process that led to the enactment of Â§ 654). In particular, the Senate Committee received testimony from present and former military commanders, including the Chairman of the Joint Chiefs of Staff, the commanding officers of each of the several military branches, and other present and former military officers, as well as from other interested persons, including academics in the fields of law and the

social sciences. See S. Rep. No 103-112, at 268-70 (1993).

The result of these reviews was Congress' enactment of the policy now at issue. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670-73, codified at 10 U.S.C. § 654. Subsection (b) of § 654 states the policy as adopted by Congress:

> A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations: (1) that the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that –(A) such conduct is a departure from the member's usual and customary behavior; (B) such conduct, under all the circumstances, is unlikely to recur; (C) such conduct was not accomplished by the use of force, coercion, or intimidation; (D) under the particular circumstances of the case the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts. (2) That the member has

> stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with the procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. (3) That the member has married or attempted to marry a person known to be of the same biological sex.

In due course, the Department of Defense issued a revised Department of Defense Directive 1332.14, which implements the policy for enlisted personnel, and Department of Defense Instruction 1332.40, which implements the policy for officers.[1]

In sum, the policy mandates the separation of a member of the armed services, subject to established administrative procedures, if the member has done one (or more) of three things: (i) engaged or attempted to engage in a homosexual act or acts (subject to some qualifications that address exceptional or aberrant behavior), (ii) stated that he or she is homosexual or bisexual (again, subject to some qualification), or (iii) married or attempted to marry a person of the same sex. See 10 U.S.C. § 654(b). Proponents of the policy have described these

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[1] For the Coast Guard, which is within the Department of Homeland Security, the policy is implemented by regulations set forth in the Coast Guard Personnel Manual. See United States Coast Guard Personnel Manual, COMDTINST M1000.6A, Chapter 12.E.

as "conduct-based" standards, rather than "status-based" ones.

Congress included several "findings" in the statutory enactment of the policy. 10 U.S.C. § 654(a). Although the word "findings" often connotes statements that resolve disputed questions of fact, it may be more appropriate to regard the congressional findings in § 654(a) as a mix of propositions of constitutional law,[2] observations about the requirements of military service,[3] and policy judgments.[4]

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[2] For example: "Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces," § 654(a)(1); "There is no constitutional right to serve in the armed forces," § 654(a)(2); and "Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces," § 654(a)(3).

[3] For example: "The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise," § 654(a)(4); "The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense," § 654(a)(5); "Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion," § 654(a)(6); "Military life is fundamentally different from civilian life in that – (A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society[,] and the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society," §

654(a)(8); "The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces," § 654(a)(9); and "Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty," § 654(a)(10).

[4] For example: "One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members," § 654(a)(7); "The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment," § 654(a)(11); "The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy," § 654(a)(12); "The prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service," § 654(a)(13); "The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability," § 654(a)(14); and "The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability," § 654(a)(15).

II. The Plaintiffs' Challenge to the Policy

The plaintiffs all allege that they were separated from military service by application of the policy embodied in § 654 and its implementing regulations, although the precise factual circumstances of separation are particular to each plaintiff. They further allege that their exclusion from military service violates their constitutional rights. They seek a declaration that the policy is unconstitutional and an injunction against its enforcement. Although the complaint alleges that § 654 is unconstitutional both on its face – that is, it would be invalid in any conceivable application, see Reno v. Flores, 507 U.S. 292, 301 (1993); United States v. Salerno, 481 U.S. 739, 745 (1987) – and as it has been particularly applied to each of them, their legal reasoning as spelled out in their memoranda in opposition to the motion to dismiss as well as their counsel's statements at oral argument make it clear that the constitutional defects they perceive inhere in any application of the policy to a homosexual service member, rather than in the particular way the policy might be (or might have been) applied in any specific case. In other words, none of the plaintiffs claims that the policy, if valid in general, was misapplied in his or her particular case to result in separation when a proper application of the policy would have allowed him or her to remain a service member.[5] Rather, their

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[5] There are some stray allegations in the complaint that might be pertinent to an "as applied" challenge, but they are

objections, as articulated in the legal arguments in opposition to the motion to dismiss, are *that* the policy was applied, not *how* it was applied. This is classically a facial challenge to the statute, and their arguments will be evaluated with that understanding.

Some plaintiffs do argue that the policy was applied to separate them from the service even though their performance of their duties was at least acceptable and in some cases superior in leadership and achievement. The fact that they were ably performing service members means, they say, that Congress' factual premise that the presence of openly homosexual service members in the service is deleterious to "morale, good order and discipline, and unit cohesion" is disproved, and the policy cannot be permitted to stand when it rests on a false factual premise. This might seem at first to be an argument that the policy was applied to these plaintiffs unconstitutionally (as distinguished from being

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not addressed or developed in the arguments on the motion to dismiss. For example, paragraph 40 of the complaint alleges that the policy is applied "unevenly," with disproportionate effect on women and persons under age 25. While the plaintiffs do present an equal protection claim, the inequality argued is between homosexuals and heterosexuals, not between women and men or younger and older service members. Additionally, paragraph 158 alleges that § 654 and its implementing regulations "are enforced arbitrarily and capriciously." These allegations might support theories of denial of equal protection or of procedural due process, but no plaintiff articulates claims relevant to the cited allegations. The equal protection argument that the plaintiffs do advance is made with respect to any application of the policy itself to any openly homosexual service member, not its disparate application to some openly homosexual service members and not to others.

unconstitutional on its face), but on reflection it is not. The claim that the policy rests on an invalid premise is a challenge to the validity of the policy as a whole.[6] The policy itself does not contemplate weighing the perceived deleterious effects of the presence of openly homosexual service members on morale, good order and discipline, on the one hand, against the individual merit or value of the service of any particular openly homosexual service member, on the other. Rather, the latter factor is omitted entirely from the operation of the policy. Under the policy, it does not matter how exemplary a service member's performance has been; if the criteria of the policy are met, separation is mandated. This is not a question of the maladministration of the policy, but rather of its administration in accordance with its terms, which terms omit to provide for the possibility of any consideration of the actual service record or performance of an individual affected by the application of the policy. Accordingly, to the extent the plaintiffs seek to avoid dismissal on the ground that factual development is necessary to the fair presentation of an as-applied challenge, the argument is beside the point, because they do not present a genuine as-applied challenge.

The complaint sets forth three separate constitutional theories in support of the relief the plaintiffs seek: "violation of due process," "violation

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[6] The plaintiffs' argument in response to the motion to dismiss uses the so-called plaintiff-specific allegations to challenge the validity of the Congressional justifications for the policy. See, e.g., Pls.' Opp'n to Defs.' Mot. Dismiss at 15-19, 34 (Pls.' Opp'n); Pls.' Surreply in Opp'n to Defs.' Mot. Dismiss at 5, 11-12 (Pls.' Surreply).

of the First Amendment," and "denial of equal protection based on sexual orientation." They are each addressed below.

III. Judicial Review of Congress' Decision-making

In order to analyze the plaintiffs' due process and equal protection claims, it is first necessary to determine the proper constitutional standard to be used to evaluate Congress' enactment of § 654.

A. Substantive Due Process

The Fifth Amendment to the United States Constitution guarantees that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. "Due process of law" refers most obviously, but not exclusively, to the requirement that when the government acts to "deprive" a person of "life, liberty, or property" it must do so in conformity with regular and fair procedures. See Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992) ("The most familiar office of [the Due Process] Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty or property . . . "). The Due Process Clause has also been considered, not entirely without controversy, to have a certain substantive, as well as procedural, puissance. In particular, a person's "liberty" under that Clause encompasses some "fundamental" interests to which the Due

Process Clause grants special protection, and governmental deprivations or infringements of such liberty interests are subject to judicial review. See Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."); see also Collins, 503 U.S. at 125 (The Due Process Clause "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.") (internal citations and quotations omitted).[7] The plaintiffs' principal argument presented under this theory is that they have "a fundamental liberty interest in private adult consensual intimacy and relationships, including consensual intimacy and relationships between adults of the same sex," Compl. ¶ 156, and

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[7] Collins and Glucksberg, like the majority of Supreme Court cases discussing the "substantive" aspect of the Due Process Clause, were addressing the Clause that appears in the Fourteenth Amendment, applicable to the States. The Fifth Amendment, applicable to the national government, is what is at issue in this case. The language of the Clause is identical in both the Fifth and Fourteenth Amendments, however, and there is no reason to think that the Court's explication of the concept of "substantive due process" under the Clause in cases arising under the Fourteenth Amendment would not apply fully to cases arising under the Fifth. See Flores, 507 U.S. at 301-02 ("Respondents' 'substantive due process' claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."); see also Salerno, 481 U.S. at 746-51.

that § 654 and its implementing regulations infringe upon and deprive them of that liberty interest. There is, the plaintiffs allege, "no compelling interest, important interest, or even legitimate governmental interest motivating those deprivations." Compl. ¶ 160. Indeed, it is alleged that § 654 is not even rationally related to any legitimate governmental interest. Id.

The plaintiffs' preferred position is that the liberty interest they identify is a "fundamental" one in the sense necessary to require the defendants to demonstrate that § 654 is justified by a compelling governmental interest and narrowly tailored to serve that interest. The defendants reply that the identified interest has not been, and should not be, considered "fundamental" in the necessary sense, so that the policy can be defended on the ground that it rationally serves the legitimate objective Congress intended it to serve.[8]

Fundamental rights or interests are those "which are, objectively, 'deeply rooted in this Nation's history and tradition' [Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977)] (plurality opinion); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' Palko v. Connecticut, 302 U.S. 319, 325

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8 The plaintiffs also allege, and have argued in opposing the motion to dismiss, that § 654 would fail even under the level of review to be applied to substantive due process challenges not involving "fundamental" rights. That contention will be discussed further below.

(1937)." Glucksberg, 521 U.S. at 720-21. "Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decisionmaking,' Collins [503 U.S.] at 125, that direct and restrain . . . exposition of the Due Process Clause." Id. Nonetheless, "history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." Lawrence v. Texas, 539 U.S. 558, 572 (2003) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). The Court in Lawrence did not say what might be the "ending point" of the inquiry in cases where history and tradition were not, but according to the concurring opinion it cited for the proposition, an "objective assessment of the necessities" of the governmental function under scrutiny would be an appropriate undertaking. Lewis, 523 U.S. at 857 (Kennedy, J., concurring). Translated to the present controversy, that presumably would authorize an "objective assessment of the necessities" of military service.

History and tradition may be said to be the starting point for the inquiry into whether there is a "fundamental" liberty interest at issue, but there is even a prior problem to be resolved, and that is how generally or specifically to characterize the proposed "liberty interest." Like navigating the strait between Scylla and Charybdis there is peril in both directions. Characterizing the liberty interest too specifically may result in a definition so narrowed by qualifying details that the claimed interest is thereby necessarily excluded from the stream of tradition. On the other hand, characterizing the interest too generally may leave it little more than a

platitude and thus allow recognition of a nontraditional interest simply because it could plausibly be proposed as a species of a traditionally recognized genus.[9] This dilemma can be sidestepped in this case because, in ruling on the motion to dismiss, I accept the plaintiffs' proffered definition of the liberty interest they contend is implicated.

The plaintiffs have characterized the liberty interest they claim in rather general terms. They say it is the "fundamental liberty interest in private adult consensual intimacy and relationships, including consensual intimacy and relationships between adults of the same sex." Compl. ¶ 156. There is no doubt that under the broad canopy extended by the first part of the definition, there reside interests that have been more particularly articulated and expressly recognized as fundamental ones for substantive due process purposes, including, as the Supreme Court itself has catalogued them,

> the rights to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535

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[9] The problem is illustrated by the debate between Justices Brennan and Scalia in Michael H. v. Gerald D., 491 U.S. 110 (1989) as to whether the right there at issue should be characterized by reference to traditionally recognized substantive parental rights of *natural parents* or those of *adulterous natural parents*. See id. at 127 & n.6, 138-40; see also Glucksberg, 521 U.S. at 769-70 (Souter, J., concurring in judgment) (in conducting substantive due process analysis, "When identifying and assessing the competing interests of liberty and authority . . . the breadth of expression that a litigant or judge selects in stating the competing principles will have much to do with the outcome and may be dispositive.").

> (1942); . . . to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, ibid.; Eisentstadt v. Baird, 405 U.S. 438 (1972); . . . and to abortion, [Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992)].

Glucksberg, 521 U.S. at 720.

The second part of the plaintiffs' definition, signaled by the word "including" to be a subset of the more general interest articulated in the first part, is more problematic for the plaintiffs' argument here. Prior to Lawrence, it would not have been possible to say that "consensual intimacy and relationships between adults of the same sex" constituted a fundamental liberty interest for purposes of substantive due process, most obviously, though not exclusively, because of the holding in Bowers v. Hardwick, 478 U.S. 186 (1986) that the Constitution did not guarantee a fundamental right to engage in homosexual conduct, even in the privacy of one's home.

Lawrence expressly overruled Bowers, however, 539 U.S. at 578, removing that case as a precedential impediment to the plaintiffs' claim here. The result in Lawrence was that the Texas statute authorizing the criminal punishment of a person who engaged in "deviate sexual intercourse with another individual of the same sex" was invalidated under the Due Process Clause of the Fourteenth Amendment. Id. at 563. Exactly what the *holding* in Lawrence was, however, seems to be a matter of some uncertainty. To the present point, the plaintiffs assert that Lawrence recognized as fundamental the

liberty interest they rely on, whereas the defendants assert that it did not. The difference in interpretations is understandable, because the Lawrence opinion does not directly answer the question.[10]

At least this much is clear: the Lawrence majority did not expressly – that is, in so many words – recognize a fundamental liberty interest in "consensual intimacy and relationships between adults of the same sex." One might stop right there. After all, for a proposition to be considered a holding, one might reasonably expect it to have been stated. This is particularly so when the proposition would state a new – that is, not previously announced – principle of constitutional law. See Glucksberg, 521 U.S. at 721 (the Supreme Court has "required in

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[10] This court and these parties are not the only ones recently to have faced this dilemma of determining whether Lawrence announced a new fundamental right, as the plaintiffs claim it does. Indeed, this is a question upon which various courts and commentators have diverged. Compare Muth v. Frank, 412 F.3d 808, 817-18 (7th Cir. 2005) (finding that Lawrence did not announce a fundamental right); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 815-17 (11th Cir. 2004) (same); United States v. Marcum, 60 M.J. 198, 204-05 (2004) (same); Loomis v. United States, 68 Fed. Cl. 503, 517-18 (2005) (same); State v. Limon, 122 P.3d 22, 29-30 (Kan. 2005) (same) with Fields v. Palmdale Sch. Dist., 271 F. Supp.2d 1217, 1221 (C.D. Cal. 2003) (including the "right to engage in private homosexual conduct" as recognized in Lawrence within a recounting of liberty interests recognized by the Supreme Court under the Due Process Clause); Laurence Tribe, Lawrence v. Texas: The Fundamental Right that Dare Not Speak Its Name, 117 Harv. L. Rev. 1893 (2004) (arguing that Lawrence implicitly recognized a new fundamental right).

substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest"); see also Flores, 507 U.S. at 302; Collins 503 U.S. at 125.

It is true, as the plaintiffs argue, that there is much language in the Lawrence opinion that would be consistent with a possible holding that recognized a fundamental liberty interest in "consensual intimacy and relationships between adults of the same sex." But despite all the foreshadowing, the anticipated denouement is missing. The reason for the omission cannot be because such a holding is obvious from the rest of the opinion. In fact, the principal dissent argued pointedly that the majority opinion had not announced the recognition of such a fundamental liberty interest under the Due Process Clause, see Lawrence, 539 U.S. at 592-94 (Scalia, J., dissenting), and it might be expected that if that statement wrongly characterized a principal holding of the case, the majority would have answered and corrected it. Contrary to the plaintiffs' argument, it more plausibly appears that the majority's silence on the point amounted to acquiescence in the dissent's statement that the case did not hold what the plaintiffs here say it did.

Moreover, beyond what the Lawrence majority said or did not say, there is the matter of what it actually did, which was, apparently, to review the challenged Texas statute under the standard of review appropriate when there is not a fundamental interest at stake.[11] The Court stated, "The Texas statute furthers no legitimate state interest which

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[11] I say apparently because again the Court did not explicitly state what standard of review it was using.

can justify its intrusion into the personal and private life of the individual." Lawrence, 539 U.S. at 578. Asking whether there is any "legitimate state interest" that can justify a statute is a way of asking whether the statute has a "rational basis." See Glucksberg, 521 U.S. at 728 (concluding that there was no fundamental liberty interest that included a right to assistance in committing suicide and then analyzing whether "Washington's assisted suicide ban [was] rationally related to legitimate government interests"); id. at 735 ("We need not weigh exactingly the relative strengths of these various interests. They are unquestionably important and legitimate, and Washington's ban on assisted suicide is at least reasonably related to their promotion and protection."); see also Heller v. Doe, 509 U.S. 312, 320 (1993) (when legislative classification is subjected to rational-basis equal protection review, it "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate purpose"). The use of the appropriate adjective is telltale to constitutional lawyers. If the Lawrence court had been evaluating the constitutionality of the Texas statute under the more exacting standard applicable to cases where fundamental interests are at stake, it would instead have asked whether the state interest was "compelling," rather than whether it was "legitimate." See Glucksberg, 521 U.S. at 721 ("As we stated recently in Flores, the Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is

narrowly tailored to serve a compelling state interest.' 507 U.S. at 302") (emphasis in original).[12] Thus, by the standard of review it applied, the Lawrence Court signaled that it did not consider that a fundamental liberty interest arising under the Due Process Clause was implicated.

For these reasons, though the matter is not free from doubt because of the ambiguity of the Lawrence opinion, I conclude that neither Lawrence nor any other relevant precedent requires treating the plaintiffs' articulated liberty interest as a "fundamental" interest calling for heightened scrutiny in judicial review of the legislative decision-making.[13] Rather, for purposes of the plaintiffs'

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12 The Court in Lawrence also did not engage in the type of analysis of the closeness of fit between the chosen legislative means and desired governmental ends that normally applies in cases involving fundamental rights. The requirement of narrow tailoring of legislation to serve the compelling governmental interest asserted is applied in cases involving fundamental liberty interests, but not in cases involving interests that are non-fundamental. See Flores, 507 U.S. at 305 ("But narrow tailoring is required only when fundamental rights are involved. The impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose and the means chosen to advance that purpose.").

13 Some other courts have similarly concluded that Lawrence did not announce a new fundamental right along the lines argued for by the plaintiffs. See Marcum, 60 M.J. at 204-05 ("In Lawrence, the Court did not expressly identify the liberty interest as a fundamental right. Therefore, we will not presume the existence of such a fundamental right in the military environment when the Supreme Court declined in the civilian context to expressly identify such a fundamental right."); Loomis, 68 Fed. Cl. at 517-18 (same); cf. Muth, 412 F.3d at 817-18 (finding that Lawrence did not announce a fundamental right of adults to engage in all forms of private

substantive due process claim, Congress' enactment of § 654 and the armed forces' promulgation of implementing regulations are to be reviewed to determine whether they lack a rational basis.[14]

B. Equal Protection

Under § 654 and its implementing regulations, openly homosexual service members are subject to separation from the armed forces for that reason alone, whereas other service members are not. The plaintiffs allege that this distinction constitutes an inequality of treatment without a compelling, important, or even legitimate government interest to justify it, amounting therefore to a violation of the equal protection aspect of the Fifth Amendment's Due Process Clause. See Compl. ¶¶ 176-180.[15]

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consensual sexual conduct); Lofton, 358 F.3d at 815-17 (holding that Lawrence did not create a fundamental right to private sexual intimacy); Limon, 122 P.3d at 29-30 (holding that Lawrence does not create any fundamental right nor does it declare homosexuals a suspect class and thus equal protection challenge to law that classifies based on homosexual conduct must be evaluated under the rational-basis test).

[14] This review collapses into consideration of the enactment of the statute, since the regulations appear to follow the congressional policy faithfully. There is no claim that the regulations are invalid in ways that the statute is not.

[15] Although the Fifth Amendment does not explicitly contain a guarantee of "equal protection of the laws," it has been made clear that there is an equal protection mandate applicable to the federal government via the Fifth Amendment's Due Process guarantee, which generally is interpreted coextensively with the Fourteenth Amendment's

The constitutional principle that "no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. . . .[Courts] have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, [they] will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Heller, 509 U.S. at 319-20). See also Beach Communications, 508 U.S. at 313 ("Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the
wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Accordingly, unless the plaintiffs can establish that the right they rely on is "fundamental" or that § 654 targets a "suspect class," equal protection calls for rational-basis review of the governmental action at issue.

Equal Protection guarantee. See Bolling v. Sharpe, 347 U.S. 497 (1954); see also F.C.C. v. Beach Communications, 508 U.S. 307, 313-14 (1993) (describing the same standard for evaluation of equal protection challenges whether the idea of "equal protection" is "embodied in the Fourteenth Amendment or inferred from the Fifth").

The plaintiffs argue for a heightened level of scrutiny "[b]ecause section 654 discriminates against gay persons in the exercise of a fundamental right" and because "sexual orientation is a suspect classification." Pls.' Opp'n at 24. The plaintiffs cite no direct authority for either of these twin propositions. For the reasons set forth in the previous section, the plaintiffs have not shown that the interest or right they identify is "fundamental" in the necessary constitutional sense. Similarly, no controlling case has held that homosexuals generally, let alone the subset of that class that the plaintiffs comprise – openly homosexual service members as defined by § 654 – constitute a "suspect class" for equal protection purposes. Indeed, in two cases where it might have agreed to such a holding, Romer and Lawrence, the Supreme Court rather conspicuously avoided doing so. Instead, in both cases, the Court employed a "rational-basis" standard of review, not a heightened standard such as "strict scrutiny" or "compelling governmental interest."[16]

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16 It is also worth noting that in neither Romer nor Lawrence did the Court engage in the type of "heightened" scrutiny short of the "strict" scrutiny which it has applied in cases involving the equal protection review of gender-based classifications, a test in which the Court evaluates whether the State, which has the burden of justifying its statute, has demonstrated there is an "exceedingly persuasive" justification for the statute or, at least, that the gender-based classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." See United States v. Virginia, 518 U.S. 515, 532-33 (1996) (internal quotations and citations omitted).

I follow this state of the law, and conclude that the equal protection claim, like the substantive due process claim, calls for review of Congress' enactment of § 654 and the regulations implemented pursuant to it under the traditional equal protection standard, which is rational-basis review.[17]

IV. Rational-Basis Review of § 654

The relevant inquiry under either substantive due process or equal protection analysis is, as a general matter, whether § 654 is rationally related to legitimate governmental interests. See Glucksberg, 521 U.S. at 728-35 (conducting rational-basis substantive due process review); Heller, 509 U.S. at 319-33 (conducting rational-basis equal protection review). In either event, the judicial role in conducting rational-basis review is deferential, representing the "paradigm of judicial restraint," and "[w]here there are plausible reasons for Congress' action, [the Court's] inquiry is at an end." Beach Communications, 508 U.S. at 313-14 (internal citations and quotations omitted).

In the equal protection setting, the Supreme Court has repeatedly emphasized the deferential nature of rational-basis review, including the admonition that it does not "authorize the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor

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[17] For the reasons previously stated, supra note 13, although the plaintiffs challenge both the statute and the implementing regulations, this review essentially collapses into a review of the legislative choice in enacting § 654.

proceed along suspect lines." Heller, 509 U.S. at 319 (internal citations and quotations omitted). "For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity," id. and "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." Id. at 321. All that is required is that the statutory enactment bear "a rational relation to some legitimate end." Romer, 517 U.S. at 631.

Deference to Congressional judgment is of even greater importance in a case such as this one where the legislation challenged was enacted pursuant to Congress' authority over the national military forces. The Constitution grants to Congress the power "[t]o provide for the common Defence," "[t]o raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, Â§ 8, cl. 1, 12-14. "Congress' power in this area 'is broad and sweeping.'" Rumsfeld v. Forum for Academic &Instit. Rights, Inc., 126 S. Ct. 1297, 1306 (2006) ("FAIR") (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)). There are constitutional limitations on Congress' power to enact legislation, notably including the Due Process Clause of the Fifth Amendment. Nonetheless "'judicial deference . . . is at its apogee' when Congress legislates under its authority to raise and support armies." FAIR, 126 S.Ct. at 1306 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

Rostker is highly instructive for the present controversy. In that case, the Supreme Court held that Congress had not violated the Due Process Clause by enacting a statute that required men, but not women, to register with the Selective Service System.[18] The Supreme Court noted two distinct reasons for judicial deference to the congressional judgment. First, a court must show "due regard to the fact that [the court] is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government." Rostker, 453 U.S. at 64 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring). "The customary deference accorded the judgments of Congress is certainly appropriate when . . . Congress specifically considered the question of the [statute's] constitutionality." Rostker, 453 U.S. at 64. Second, Congress had relied explicitly on its constitutional "authority over national defense and military affairs," and the Court observed that "perhaps in no other area has the Court accorded Congress greater deference." Id. at 64-65. The Court further took care to note that "a healthy deference" to Congress in these circumstances, id. at 66, was not an abdication of the Court's "ultimate responsibility to decide the constitutional question," but simply a recognition "that the Constitution itself requires such deference to congressional choice." Id. at 68. The Rostker Court

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[18] The claim was that the classification – men must register, women may not – violated the Fifth Amendment's equal protection guarantee.

also found it significant that the gender-based classification there at issue was not just the "accidental byproduct of a traditional way of thinking," id. at 74, but rather had been at the very center of the congressional debate. "The issue was considered at great length, and Congress clearly expressed its purpose and intent." Id.

Here, as in Rostker, the challenged statute was the result of extended consideration in both the Executive and Legislative Branches. In the Executive Branch, the Department of Defense conducted a detailed review and the Secretary of Defense shared the review and its conclusions with Congress. In Congress, there were hearings by committees of both Houses at which the arguments for and against the policy were aired and debated. The resulting legislation was the end product of a focused process of debate and deliberation. See Thomasson v. Perry, 80 F.3d 915, 921-23 (4th Cir. 1996) (recounting the history of the enactment of § 654 and concluding that "[w]hat [the plaintiff] challenges, therefore, is a statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiation and deliberation").

The reasons for Congress' approval of the statute are essentially stated in § 654(a). See supra notes 2-4. Probably the most critical congressional finding articulated in the statute as a reason for the exclusion of announced or actively practicing homosexuals from military service is the last one, set forth in Â§ 654(a)(15):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

This proposition is a combination of a factual premise – that there is as a matter of fact some level of risk to morale, good order and discipline, and unit cohesion from the presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts – and an evaluative judgment – that the identified risk is unacceptable. The legitimacy of the end Congress sought to serve – maintaining effective military capability by maintaining high standards of morale, good order and discipline, and unit cohesion – cannot be doubted. Thus, in this case, if there is a problem with the congressional enactment of the policy, it lies in the relationship of the means selected to promote that concededly legitimate end. In other words, the question is whether the means chosen – the policy embodied in § 654 – rationally conduces to achieve the end of maintaining effective military services.[19]

In the hearings that led to the enactment of § 654, Congress was advised by the Nation's military leaders that the presence of open homosexuals in

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[19] It should be noted that the issue presented here is different from that faced in both Lawrence and Romer, decided under substantive due process review and equal protection review, respectively. In those cases, the Supreme Court found that the law in question furthered no legitimate purpose.

military service would interfere with the development of cohesive units and would harm discipline and morale.[20] Contrary views and assessments from other qualified persons were also given.[21] After considering the information presented

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20 An example is the testimony of General Colin Powell, Chairman of the Joint Chiefs of Staff, who testified before the Senate Armed Services Committee on July 20, 1993, saying in part: "To win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force. * * * * "[T]he presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit

of the armed forces." S. Rep. No. 103-112, at 275, 278 (1993).

21 The plaintiffs assert in their opposition to the motion to dismiss, see Pls.' Opp'n at 32, and in the complaint, see Compl. ¶ 45, that there were at least three reports before Congress at the time of enactment of § 654 which reached a conclusion contrary to the views of the military leadership. The defendants acknowledge that these reports were considered by Congress in the debate leading up to § 654's enactment, pointing out that some Members relied on them to support their position against the legislation while others discounted those reports' persuasiveness. See, e.g., 139 Cong. Rec. S11172-74 (Sept. 9, 1993) (statement of Sen. Nunn); id. at S11197-98 (Sept. 9, 1993) (statement of Sen. Kennedy); id. at S11204 (Sept. 9, 1993) (statement of Sen. Feingold); id. at H7069 (Sept. 28, 1993) (statement of Rep. Kyl); id. at H7070 (Sept. 28, 1993) (statement of Rep. Morella); id. at H7077 (Sept. 28, 1993) (statement of Rep. Studds); id. at H7081-82 (Sept. 28, 1993) (statement of Rep. Schroeder). There is no basis in the congressional record to conclude that the views of the opponents of the policy were ignored. Rather, in the end, the

by those both in favor of and opposed to the proposed policy, Congress was persuaded to adopt it. As the findings set out in § 654(a) demonstrate, Congress was persuaded to the position articulated by the military leadership, who were presumably articulating the policy of the Executive Branch, that separation of open homosexuals from military service would help to maintain high effectiveness in the armed forces. That proposition had support in the record developed in the legislative process, and its acceptance was accordingly rational in the sense necessary to withstand constitutional challenge. This is sufficient to conclude the substantive due process review and, for the most part, forecloses the plaintiffs' challenge on the grounds that the classification made by § 654 violates equal protection principles. There are some arguments the plaintiffs make that apply uniquely to the equal protection claim, however.

In support of their equal protection challenge, the plaintiffs argue that the classification drawn by Congress is simultaneously too broad, because it excludes service members who individually pose no threat to military effectiveness, and too narrow, because it does not apply to other groups whose presence in the military may present a similar risk to morale, good order and discipline. See Pls.' Opp'n at 25. The argument is not one with any heft in cases where the legislation is reviewed under the traditional equal protection rational-basis standard. This is illustrated by cases considering whether

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proponents of the policy persuaded more Members to their view than the opponents did.

classifications based on generalizations about age, as a proxy for job suitability, violate the Equal Protection Clause. In that context, the Court has said that "the constitutionality of state classifications on the basis of age cannot be determined on a person-by-person basis. Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a classbased level, even if it 'is probably not true' that those reasons are valid in the majority of cases." Kimel v. Florida Bd. of Regents, 528 U.S. 62, 85-86 (2000).

One of the cases cited by Kimel was Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 315 (1976). In Murgia, the Court upheld under rational-basis review the State's mandatory retirement age for uniformed state police officers, noting: "Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective. . . . That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'

Dandridge v. Williams, 397 U.S. [471,] 485 [(1970)]." Murgia, 427 U.S. at 315-16 (footnotes omitted).

Similarly, in Vance v. Bradley, 440 U.S. 93 (1979), the Supreme Court upheld against an equal protection challenge of Congress' decision to establish a mandatory retirement age of 60 for employee participants in the Foreign Service retirement and disability system but not for other federal employees who were participants in the Civil Service retirement and disability system. The case is instructive for two reasons. First, the Court again applied the principle that classifications in legislation may be approximate. Id. at 109 ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'"). Second, the Court rejected an argument like one made by the plaintiffs here, that in order to sustain the challenged legislation, a court would have to have "current empirical proof" that the underlying factual premise relied on by Congress was true. See id. at 110. In Bradley, the argument was that the District Court should permit a trial to determine whether "health and energy tend to decline somewhat by age 60," with the suggestion that if the court did not find that to be true, the legislative classification based on that premise could not stand. In the present case, the plaintiffs press a similar argument: that this suit should be permitted to continue so that the congressional premise that the service of open homosexuals in the armed forces threatens the effectiveness of the military can be tested in this court by "current empirical proof." The

Supreme Court rejected that argument in Bradley and so it must be rejected here as well.[22]

The reason is that there is an important distinction, well recognized by lawyers, constitutional and otherwise, between the kinds of "facts" relied on by legislatures, on the one hand, and by courts, on the other. Adversary litigation as conducted in the Judicial Branch typically involves the application of a principle of law to a concrete set of factual circumstances. [23] For example, the legal principle might be: "A party to a binding contract who fails without excuse to perform his promise to the other party is liable in damages for loss caused by his breach." The factual inquiry will be whether the facts of the particular case are such as to support the application of the principle. Was the defendant in fact a party to a binding contract? Did the defendant in fact fail to perform his promise? Were there in fact circumstances which excuse his

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[22] The Supreme Court has also applied this same principle in conducting rational-basis review of government personnel policies which made classifications of employees based on factors other than age and were challenged on an equal protection basis because they were alleged to be based on generalized assumptions that did not necessarily hold true in the case of all employees so classified. See New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-93 (1979) (applying rational-basis review and holding that Transit Authority rule excluding all methadone users from employment without requiring individual assessment of the qualifications of each worker did not deny equal protection).

[23] There is the constitutional requirement, for instance, that there be an actual "case" or "controversy," and not merely a hypothetical one. See U.S. Const. art. III, § 2; Flast v. Cohen, 392 U.S. 83, 94-97 (1968).

nonperformance? What harm in fact was caused to the other side, and to what extent? And so on. Generally the factual inquiry is an historical one: what in fact happened between these parties?

Factual inquiries by Congress are different. Their focus is not so much on particulars, but on generalities, and their purpose is not to settle concrete disputes, but to prescribe broadly applicable policies. To be sure, factual data and empirical evidence may properly be, and usually are, considered in the legislative process. For instance, in deciding whether to adopt a policy of mandatory retirement for Foreign Service workers at age 60, Congress might consult epidemiological data concerning the effects of natural aging on health and energy. But Congress does not resolve factual disagreements the way a court does, by finding that one side to a controversy has sustained a burden of proof and then making a concrete resolution of the facts of a particular case. Rather, Congress draws on the evidence presented with respect to proposed legislation in deciding what general facts are true and what policy judgments might rationally be supported by those generally true facts.[24] Thus, for

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[24] There is more than just a difference in mission between Congress and the courts. There is a difference in institutional competence as well. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. . . . As an institution, moreover, Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon an issue . . . ." Turner Broadcasting Sys., Inc. v. F.C.C., 512 U.S. 622, 665 (1994) (opinion of Kennedy, J.) (citations omitted).

Congress' purposes, it does not matter that any particular Foreign Service officer can run marathons at age 60 if the evidence rationally supports the conclusion that vigorous performance of duties generally diminishes with age and that an early retirement age thus serves the interest of maintaining an effective Foreign Service.

Consequently, in an equal protection case in which review is to be conducted according to the rational-basis standard, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." Bradley, 440 U.S. at 111. What that means in this case is that the plaintiffs would have to show that Congress could not reasonably conceive that the service of open homosexuals in the military would have the deleterious effect on "morale, good order and discipline, and unit cohesion" that was described by some military leaders and is contained in the legislative record. The plaintiffs cannot meet that standard. As to historical facts, the record before Congress included testimony from officers that the presence of homosexual service members had in their experience negatively affected a unit's morale, discipline, and cohesiveness.[25] Congress was not

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[25] For example, General H. Norman Schwarzkopf, U.S. Army (Ret.), testified before the Senate Armed Services Committee as follows: "[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war . . . . "[I]n every case I am familiar

required to accept and rely on such testimony, but it plainly was entitled to do so. And, as explained above, if it was possible for Congress rationally to accept the factual premise – that there is some level of risk in permitting the service of openly homosexuals in military units – then it was also possible rationally to conclude that a means for reducing or eliminating the acknowledged risk would be to exclude open homosexuals from service in military units. Similarly, in conducting what could be described as its "legislative factfinding" role, Congress was free not to rely on evidence, including some which the plaintiffs rely heavily upon, see supra note 20, which tended to prove contrary propositions. It is not for this court on rational-basis review to conduct a re-weighing of the evidence that was before the legislative decision-makers. See Rostker, 453 U.S. at 82-83 ("The District Court was quite wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of Congress' evaluation of that evidence.").

The plaintiffs' contention that § 654 fails to pass constitutional muster under even rational-basis review is predicated on the proposition that a special kind of "active" rational-basis review is called for. They claim that there should be a "more searching form of review" that would involve skeptically inquiring into whether the proffered justifications for the policy are "substantiated." When that is done,

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with, and there are many, whenever it became known in a unit that someone was openly homosexual, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered." S. Rep. No. 103-112, at 280 (1993).

they say, § 654 does not survive review because the interest in "unit cohesion" emphasized by the defendants is little more than a pretext for animus against homosexual service members. See Pls.' Opp'n at 13-19; Pls.' Surreply at 3-6. At the very least, the plaintiffs urge that the case should be permitted to go forward, with an opportunity for discovery, so that there might be an inquiry into the legitimacy of Congress' motivation. See Pls.' Surreply at 3-6. The authorities they rely on in support of this line of argument include principally Romer, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528 (1973), and Justice O'Connor's concurring opinion in Lawrence, which itself relies principally on the other three cases mentioned.[26]

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[26] The plaintiffs argue that the traditional form of rational-basis review is reserved for legislative classifications pertinent to economic and social welfare regulation. Some cases have stated that the rational-basis test is to be applied in reviewing such legislation, see e.g., Beach Communications, 508 U.S. at 313; Dandridge, 397 U.S. at 485, but the purpose of the statement in those cases seems to have been to distinguish such cases from those involving fundamental rights or suspect classifications. See Murgia, 427 U.S. at 312 (stating that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.") (footnotes omitted). It is not necessary to determine that a case involves regulation of "economics and social welfare," Dandridge, 397 U.S. at 485, in order to apply the rational-basis test. Rather, it is necessary to determine if the case involves a fundamental right or a suspect class. If so, strict scrutiny is the standard; if not, rational-basis is. See Romer, 517 U.S. at 631.

As an initial matter, the plaintiffs argue that this proposed "active" rational-basis test should be applied in support of both their equal protection and substantive due process claims. If such a distinct test does exist, it has only been employed by the Supreme Court in a limited number of cases, all of which invalidated challenged legislative acts under an equal protection theory. See Romer, 517 U.S. at 634-36; Cleburne, 437 U.S. at 446-50; Moreno, 413 U.S. at 533-38. Similarly, Justice O'Connor's statements about an elevated level of review were made relative to her consideration of the issue in Lawrence under an equal protection theory only, see Lawrence, 539 U.S. at 574-75, rather than the majority's substantive due process theory. Therefore, to the extent that an "active" rational-basis review should be applied here, it should only be applied to the plaintiffs' equal protection claim.

I do not agree that a more "active" or "searching" review is appropriate to decide whether the plaintiffs can establish that the enactment of § 654 was not rationally related to the achievement of a legitimate governmental interest. To begin with, it is far from clear that the cases relied on by the plaintiffs in making this argument applied anything other than the traditional rational-basis test, as described earlier in this opinion. Indeed, the Court itself has indicated that the traditional standard of review was used in some of those cases. In Heller, the Court said in discussing Cleburne,"We have applied rational-basis review in previous cases involving the mentally retarded and mentally ill. See [Cleburne, 473 U.S. at 432; Shweiker v. Wilson, 450 U.S. 221 (1981)]. In neither case did we purport to

apply a different standard of rational-basis review from that just described." Heller, 509 U.S. at 321. The Court had "just described" the rational-basis standard of review, emphasizing the deferential nature of that test. See id. at 320-21. The Court then went on to conduct the traditional, deferential rational-basis review of legislation that was alleged to have disadvantaged the mentally retarded, the same group that was alleged to have been harmed in Cleburne. See id. at 322-29. Likewise, the Court in Moreno did not in the end use any rational-basis standard other that the traditional one. See 413 U.S. at 538 (holding that the law challenged in that case's classification is invalid because it is "wholly without any rational basis").

Be all that as it may, even assuming that the mode of analysis based on Romer, Cleburne, and Moreno that Justice O'Connor suggested in Lawrence accurately captures the teaching of the prior cases, that principle would still not apply here. Those cases that arguably applied a "more searching" form of review would have done on the basis that the challenged law exhibited a "bare . . . desire to harm a politically unpopular group," something the Court has consistently held is not a legitimate governmental interest (and thus not a rational basis for legislation). See Lawrence, 539 U.S. at 580 (O'Connor, J. concurring in judgment) ("When a law exhibits [a bare] desire to harm a politically unpopular group, [the Court has] applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); Romer, 517 U.S. at 635 (the challenged amendment to the Colorado constitution violated

equal protection because it "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else"); Cleburne, 473 U.S. at 450 ("The short of it is that requiring the permit [for the mentally retarded group home] in this case appears . . . to rest on an irrational prejudice against the mentally retarded."); Moreno, 413 U.S. at 534-35 ("The challenged classification clearly cannot be sustained by reference to this congressional purpose [to prevent 'hippies' from participating in the food stamp program]. For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). Here, however, there can be no question that Congress' stated reasons for enacting § 654, even if misconceived or unconvincing, represented more than just a "bare congressional desire to harm a politically unpopular group." Rather, Congress' expressed purpose was to assure the effectiveness of the armed forces. Once that is acknowledged, the inquiry turns to whether the means chosen to advance that end – eliminating what is judged to be an impediment to a desired level of "morale, good order and discipline, and unit cohesion" – is a rational one. Neither Romer, Cleburne, Moreno, nor Justice O'Connor's Lawrence concurrence teaches otherwise.[27]

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[27] Justice O'Connor, proposing to employ a "more searching" approach in evaluating the Texas criminal sodomy statute at issue in Lawrence, said that her reason for invalidating the law was that the sole state interest asserted in that case, moral disapproval of same-sex relations, was not a

Furthermore, especially in light of the principle that some overinclusiveness or underinclusiveness in a legislative classification does not necessarily condemn it under equal protection analysis, the plaintiffs' factual allegations regarding the operation of § 654 in practice are not adequate to support a conclusion in their favor that the link between the legitimate goal of § 654 and the classification drawn to serve that goal is so attenuated as to demonstrate that the law is grounded in nothing more than "animus." In short, it is not possible, taking the factual allegations of the complaint as true, to say that "the breadth of [§ 654] is so far removed from [Congress'] justifications that . . . it [is] impossible to credit them," that § 654 is not directed to "any identifiable legitimate purpose or discrete objective," that it is "a status-based enactment divorced from any factual context from which [one] could discern a relationship to legitimate state interests," or that § 654 is simply "a classification of persons undertaken for its own sake." Romer, 517 U.S. at 635; see also Cleburne, 473 U.S. at 446 ("The State may not rely on a classification whose relationship to an asserted goal

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legitimate one. She observed, however, that there were other state interests that could be recognized as legitimate beyond mere disapproval of an unpopular group, such as "national security or preserving the traditional institution of marriage." See 539 U.S. at 585 (O'Connor, J. concurring in judgment) (emphasis added). To the extent it is either practical or desirable to draw guiding principles from obiter theorizing by the Justices, it appears that Justice O'Connor would not consider this case one for the application of the sort of "elevated" of rational-basis review she would advocate in some other cases.

is so attenuated as to render the distinction arbitrary or irrational."); Moreno, 413 U.S. at 538 ("Traditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety' . . . . But the classification here in issue is not only 'imprecise,' it is wholly without any rational basis.").[28]

This is an issue about which thoughtful persons have disagreed. However, the plaintiffs' position here is (as it must be) that no legitimate disagreement is possible, that there is only one legitimate position to take on the issue, and that position is that Congress was wrong, both as to its assessment of the factual premise – that there is some level of risk to an effective military from the active service of open homosexuals – and as to its evaluation of the level of risk – that the risk is "unacceptable." See Heller, 509 U.S. at 320-21; see also id. at 326 ("States are not required to convince the courts of the correctness of their legislative judgments. Thus, since the question is at least debatable, rational-basis review permits a legislature to use just this sort of generalization")

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[28] This conclusion is underscored by the difference in context between this case and the prior cases cited by the plaintiffs. As the Second Circuit has noted, "Those cases did not arise in the military setting. In the civilian context, the Court was willing to examine the benign reasons advanced by the government to consider whether they masked an impermissible underlying purpose. In the military setting, however, constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its action." See Able v. United States, 155 F.3d 628, 634 (2d Cir. 1998).

(citations and internal quotations omitted); Beach Communications, 508 U.S. at 320 ("The assumptions underlying these [plausible] rationales may be erroneous, but the very fact that they are 'arguable' is sufficient, on rational-basis review, to 'immuniz[e]' the congressional choice from constitutional challenge. Vance v. Bradley, 440 U.S. 93, 112 (1979).").

It would be impossible to agree with the plaintiffs' position without ignoring the obligation to defer to Congress' judgment, both as a matter of rational-basis review of legislative decision-making, see Glucksberg, 521 U.S. passim; Heller, 509 U.S. passim, and as a matter of deference to Congress' judgment in regulation of the military. See Rostker, 453 U.S. passim. The plaintiffs themselves recognize this, because they argue that deference to Congress' judgment is not required. Their argument in this respect, however, depends on the characterization of the liberty interest at stake as "fundamental" or a finding that the classification is constitutionally "suspect," the necessary predicates to invoke a heightened form of judicial review. They are correct that the calculus of deference to congressional decision-making is different when a fundamental interest is at stake or suspect class implicated. But, for the reasons stated above, I have concluded that is not the case here. Under the rubric of rational-basis review, deference to congressional judgments is required.

It should not have to be said, though given the nature of the issue it is worth saying so for emphasis, that deciding that Congress has made a rational choice is not the same as deciding it has

made a wise choice.[29] Wisdom, or its lack, is not a constitutional category. Acting within their proper constitutional authority, Congress and the Executive Branch are free to act both wisely and unwisely, and the remedy for bad decision-making by the Political Branches is to be found in the working of the political process. The office of the judiciary is to enforce the constitutional limitations on executive and legislative action that do exist, as those limitations are elaborated in the Constitution and applicable precedents. If a court determines that Congress has acted within the limits on its authority imposed by the Constitution, the court's inquiry and interest in the matter are at an end.[30]

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29 See Heller, 509 U.S. at 319 (rational basis review "'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' Beach Communications, Inc., 508 U.S. at 313.")

30 The plaintiffs also have alleged and argue that the experience of the armed forces since the enactment of § 654 undercuts the asserted justifications for the statute. See Compl. ¶ 46; Pls.' Opp'n at 33-3; Pls.' Surreply at 13. If that is so, it counsels at least as much in favor of allowing Congress' reconsideration of the policy as it does foreclosing any debate by judicial decision. See Schlesinger v. Ballard, 419 U.S. 498, 510 n.13 (1975) ("These developments no more than reinforce the view that it is for Congress, not for the courts, to decide when the policy goals sought to be served by [10 U.S.C.] § 6401 are no longer necessary to the Navy's officer promotion and attrition programs"); Thomasson v. Perry, 80 F.3d 915, 934 (4th Cir. 1996) ("In the end, the best service courts can render is to return [the debate over § 654] to where it all began–to the halls of democratic governance, where the many Americans affected by decisions such as these can participate directly in their resolution."); cf. Glucksberg, 521 U.S. at 735 ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of

I conclude as a matter of law that § 654 and its implementing regulations do not deprive the plaintiffs of substantive due process, and their claim to that effect must be dismissed for failure to state a claim upon which relief can be granted. I also conclude, as a matter of law, that the plaintiffs have failed to state a claim under their equal protection theory upon which relief can be granted, and that claim must be dismissed.

V. Infringement of First Amendment Rights

Section 654(b) provides in part:

> A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:
> * * * *
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member

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physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."). I note that a bill has been introduced in the House of Representatives that would repeal § 654, establish a policy of non-discrimination based on sexual orientation, and require re-accession of otherwise qualified former service members who were separated in accordance with § 654 and its implementing regulations. See Military Readiness Enhancement Act of 2005, H.R. 1059, 109th Cong. (introduced March 17, 2005).

> has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

10 U.S.C. § 654(b)(2).

The plaintiffs assert that this provision restricts their speech in violation of the First Amendment. Specifically, they say, it penalizes statements by them about their sexual orientation, because statements will be used by the armed forces as a basis for separating service member from his or her particular branch.[31] The plaintiffs also contend that § 654, in practice, forces them to remain silent about their sexual identity and thus violates the First Amendment by compelling them to affirm an identity other than their own.

The claim is not viable. The policy embodied in § 654 is, by its terms, directed at homosexual conduct or the propensity or intention to engage in such conduct. The fact that one might speak about one's conduct, or one's propensity or intention to engage in certain conduct, does not mean that a governmental regulation pertaining to the conduct is also an impermissible restriction on speaking about it. When certain conduct combines both "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First

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[31] An exception exists for statements made "for the purpose of avoiding or terminating military service." 10 U.S.C. § 654(e).

Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968).

The governmental interest served by § 654(b)(2) is the effective enforcement of the policy. Facilitating the enforcement of a valid policy is a legitimate, and one may even say important, governmental interest. See Wayte v. United States, 470 U.S. 598, 611-13 (1985).

For purposes of the administration of the policy, the significance of a statement of the kind described in § 654(b)(2) lies in its evidentiary value. In effect, § 654(b)(2) creates a presumption that a person who states that he or she is a homosexual (or bisexual) may on the basis of the statement be considered to have an intention or propensity to engage in homosexual conduct. It is as if the statute said, "We'll take you at your word. If you say you are a homosexual, we will infer that you have the intention or propensity to act accordingly." The presumption is rebuttable, and a service member may demonstrate that the statement is not a basis for inferring propensity or intention to engage in homosexual conduct and thus avoid separation pursuant to Â 654.

The evidentiary use of statements by a person to prove that person's intent is common in the adjudication of cases and is not prohibited by the First Amendment. See Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) (stating that the First Amendment "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent"). The fact that a person may experience a disadvantageous consequence from having made a statement that is later used for its

value as evidence of a fact is not the kind of "burdening" of the right to free speech that raises serious First Amendment concerns. Id. at 488-89. Indeed, under the Federal Rules of Evidence, a party's prior extrajudicial statement is admissible as non-hearsay only when it is offered against the party by a litigation opponent – that is, only when disadvantage flows from the person's having made the statement. See Fed. R. Evid. 801(d)(2)(A). The admission of such statements in evidence occurs routinely.

An argument not dissimilar to the plaintiffs' here was rejected by the Supreme Court in Wayte, 470 U.S. 598. Wayte had been prosecuted for failing to register with the Selective Service System as he was required by law to do. Not only had Wayte not registered; he also had written letters to the President and to the Selective Service System stating that he did not intend to register. At the time, the Selective Service System had a policy of "passive enforcement" according to which only those violators who came to the attention of the Service without active investigation would be prosecuted. When Wayte was prosecuted under this policy (having brought himself to the attention of the authorities), he objected that the passive enforcement policy punished speech protected by the First Amendment, *viz.* his protest letters to government officials in which he declared his refusal to register. The Supreme Court rejected the First Amendment claim, concluding that the passive enforcement policy served an important governmental interest in facilitating prompt and effective enforcement of the Selective Service

registration requirement (which the Court noted was imposed pursuant to Congress' powers to "provide for the common Defence" and "to raise and support armies"), and that the enforcement policy imposed only an incidental burden on First Amendment freedoms. Id. at 611-13.

So here. As discussed in prior parts of this opinion, the policy rationally serves the important governmental interest of maintaining an effective national military. In authorizing the use of a person's statement as evidence that the person has engaged or has the propensity or intention to engage in homosexual conduct, Congress imposed only a minimal burden on the right to free speech guaranteed by the First Amendment. See Mitchell, 508 U.S. at 488-90; Wayte, 470 U.S. at 612-13. The burden is further minimized by dint of the fact that the authorized presumption is a rebuttable one, permitting the service member affected, in cases where it is possible, to reduce the evidentiary value of the speech, and thus any "burden," to nil.

Other courts have rejected First Amendment claims similar to that presented by the plaintiffs here. See Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997); Able v. United States, 88 F.3d 1280, 1300 (2d Cir. 1996); Thomasson, 80 F.3d at 931. As the Fourth Circuit has succinctly put it:

> There is no constitutional impediment, therefore, to the use of speech as evidence of facts that may furnish a permissible basis for separation from military service. No First Amendment concern would arise, for instance, from the discharge of service members for

> declaring that they would refuse to follow orders, or that they were addicted to controlled substances. Such remarks provide evidence of activity that the military may validly proscribe.

Thomasson, 80 F.3d at 931. Thus, the plaintiffs are incorrect that § 654 constitutes a presumptively invalid burden on speech. The policy is properly justified, on a content-neutral, nonspeech basis, as a means of preventing the disruption to military readiness from homosexual activity by service members that Congress could legitimately (for the reasons previously set forth) take action to forestall. See id. at 932-33.

For these reasons, the plaintiffs' First Amendment claim is without merit and must also be dismissed for failure to state a claim upon which relief can be granted.

VI. Summary

Following the codification of the "Don't Ask, Don't Tell" policy by Congress as 10 U.S.C. § 654, a number of courts considered and rejected challenges to the policy substantially similar to the challenges presented by the plaintiffs here. See Able v. United States, 155 F.3d 628 (2d Cir. 1998); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997), cert. denied, 525 U.S. 1067 (1999); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996), cert. denied, 522 U.S. 807 (1997); Able v. United States, 88 F.3d 1280 (2d Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th

Cir.) (en banc), cert. denied, 519 U.S. 948 (1996); see also Hoffman v. United States, 1997 WL 136418 (E.D. Pa. March 24, 1997) (upholding constitutionality of Â§ 654 against constitutional challenge), aff'd, 124 F.3d 187 (3d Cir. 1997) (Mem.). After the Supreme Court decided Lawrence (and overruled Bowers), the question occurred whether a renewed challenge might succeed, premised, as the plaintiffs have principally done here, on the proposition that Lawrence had recognized as "fundamental" the liberty interest the plaintiffs propose and rely on, or if not that, had treated homosexuals (or openly homosexual service members) as a "suspect class" for purposes of constitutional analysis.

For the reasons set forth in this opinion, I have concluded that Lawrence did not work the changes in the law the plaintiffs argue for, and that settled constitutional doctrine calls for evaluating the substantive due process and equal protection challenges to the statute according to the rational-basis standard. Under this standard, I conclude, as all the pre-Lawrence cases did, that § 654 does not violate the Due Process Clause of the Fifth Amendment.

The First Amendment claim is a weak one, not even potentially affected by Lawrence or the demise of Bowers, and I have found it unmeritorious as a matter of law, again in line with the decisions of all the other courts that have considered the issue. As a matter of law, the plaintiffs' complaint fails to state a claim upon which relief can be granted. Therefore, the defendants' motion to dismiss the complaint is ALLOWED and the complaint is

DISMISSED. A judgment of dismissal with prejudice shall enter accordingly.
It is SO ORDERED.
April 24, 2006 \s\ George A. O'Toole, Jr.
DATE DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 06-2313

THOMAS COOK; MEGAN DRESCH; LAURA GALABURDA; JACK GLOVER; DAVID HALL; MONICA HILL; JENNY LYNN KOPFSTEIN; JENNIFER MCGINN; JUSTIN PEACOCK; DEREK SPARKS; STACY VASQUEZ

Plaintiffs - Appellants

JAMES E. PIETRANGELO, II

Plaintiff

v.

ROBERT M. GATES, Secretary of Defense; MICHAEL CHERTOFF, Secretary of Homeland Security; UNITED STATES

Defendants - Appellees

No. 06-2381

THOMAS COOK; MEGAN DRESCH; LAURA GALABURDA; JACK GLOVER; DAVID HALL; MONICA HILL; JENNY LYNN KOPFSTEIN; JENNIFER MCGINN; JUSTIN PEACOCK; DEREK SPARKS; STACY VASQUEZ,

Plaintiffs

JAMES E. PIETRANGELO, II

Plaintiff - Appellant

v.

ROBERT M. GATES, Secretary of Defense;

MICHAEL CHERTOFF, Secretary of Homeland Security; UNITED STATES
Defendants – Appellees

Before
Lynch, Chief Judge,
Campbell, Torruella, Boudin*, Lipez* Howard,
Circuit Judges,
and Saris**, District Judge.

ORDER OF COURT
Entered: August 8, 2008

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc filed by appellant James Pietrangelo, II in 06-2381 has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
/s/ Richard Cushing Donovan,
Clerk

*Judge Boudin and Judge Lipez are recused and did not participate in the consideration of this matter.
**Of the District of Massachusetts, sitting by designation.

cc:
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 04-12546-GAO
THOMAS COOK, MEGAN DRESCH, LAURA GALABURDA,
JACK GLOVER, DAVID HALL, MONICA HILL, JENNY LYNN
KOPFSTEIN, JENNIFER McGINN, JUSTIN PEACOCK, JAMES E.
PIETRANGELO II, DEREK SPARKS, STACY VASQUEZ,
Plaintiffs,
v.
DONALD H. RUMSFELD, Secretary of Defense, MICHAEL CHERTOFF, Secretary of Homeland Security,
UNITED STATES OF AMERICA,
Defendants.

MEMORANDUM AND ORDER
September 5, 2006

O'TOOLE, D.J.

The motion by plaintiff James E. Pietrangelo, II, for reconsideration of the Court's grant of the defendants' motion to dismiss (Dkt. No. 28) is properly considered a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Under Rule 59(e), "a court may alter or amend a judgment based on a '"manifest error of law or fact"' or newly discovered evidence. . . . [T]he rule 'does not allow a party to . . . advance arguments that could and should have been presented to the . . . court prior to the judgment.'" Zukowski v. St. Lukes Home Care Program, 326 F.3d 278, 282 n.3 (1st Cir. 2003)

(quoting Aybar v. Crispin-Reyes, 118 F.3d 10, 16 (1st Cir. 1997)). Moreover, "the repetition of previous arguments is not sufficient to prevail on a Rule 59 (e) motion." See United States v. $23,000 in U.S. Currency, 356 F.3d 157, 165 n.9 (1st Cir. 2004).

Thus, to the extent that Pietrangelo seeks to present new arguments that could have been made previously, relief under Rule 59(e) is not warranted. To the extent that he seeks to make a better argument than that which was previously made on points that were raised (which he calls "reframing" the earlier arguments), he would have to show that the judgment, made after consideration of purportedly deficient arguments, rested on a "manifest error of law or fact." He has not shown that. In the absence of such a showing, the remedy for an erroneous judgment is to be found in appellate review in the ordinary course.

Accordingly, the motion is DENIED.

September 5, 2006 /s/ George F. O'Toole, Jr.

EXCERPT FROM PIETRANGELO DISTRICT COURT MOTION FOR RECONSIDERATION

II. The Court Totally Missed Plaintiffs' Other Equal Protection Claim

This Court was so engrossed in the myth of harm to unit cohesion that it totally missed one of Plaintiffs' equal protection claims—that of arbitrary government action under the operation or application of § 654. See, *e.g.*, Willowbrook v. Olech, 528 U.S. 562, 564 (2000); Romer v. Evans, 517 U.S. 620, 632 (1996). In fact, the Court's failure to appreciate this one claim in particular demonstrates that it has no understanding whatsoever—and made no attempt to understand—of the insidiousness of § 654. To the Straight observer, including this Court, § 654 and its implementing regulations is a benign regime that simply and discreetly operates to prevent openly Gay individuals or individuals concluded by commanders to be Gay from joining the military or staying in the military. In essence, under this theory, § 654 is nothing more than, say, a neutral local property ordinance. A law may forbid a homeowner from building a certain kind of fence. If a homeowner openly applies for a building permit to build that kind of fence, the local municipality will deny the permit. If a homeowner builds that kind of fence without getting a permit, and the local municipality finds out about it after the fact, the municipality will require the homeowner to remove the fence. The total supposed incidence of the law upon the individual concerned consists only in the simple prohibition of something: in the case of the

local ordinance, erection of the particular kind of fence, in the case of § 654, military service by Gays. Thus, in its Opinion, this Court found that Plaintiffs' claims about how § 654 was applied were really nothing more than complaints "*that* the policy was applied." See Opinion, at 8; see, also, at 9 ("This is not a question of the maladministration of the policy, but rather of its administration in accordance with its terms.") To be sure, Plaintiffs certainly objected that the policy was applied in the first place as a matter of equal protection (suspected class/protected class kind). However, as any Gay individual who has ever served in the military knows, § 654 and its implementing regulations is anything but a discreet, neutral regime, and has anything but a discreet, neutral incidence.

In fact, as would be expected with a law that is motivated by animus against one particular group, § 654 is designed to, and results in, separate real and substantial harm to Gays, even before they are discharged—just like segregation resulted in extensive abuse of Blacks servicemembers, and just as "separate but equal" was not really equal ("colored" accommodations were usually inferior). It would be, with respect to the fence analogy, as if the local ordinance allowed the building code inspector not merely to remove the fence, but to beat the homeowner up, harass him, and peek in his bathroom windows. Section 654's regime, in short, allows the military to routinely harass and abuse and conduct witch hunts against Gay servicemembers or those perceived to be Gay servicemembers. That is not hyperbole for purposes of this Motion. That is pure, hard, demonstrable

fact. Commanders and servicemembers regularly act out their personal (but societal) prejudices against Gay servicemembers, humiliating them, assaulting them, harassing them, and acting arbitrarily towards them in administrative actions and in the discharge process on a daily basis. According to a study done by the Department of Defense itself in 2000—ten years after "Don't Ask, Don't Tell" was instituted—more than 80% of 71,000 randomly-surveyed service members said that they had heard offensive speech, derogatory names, jokes, or other remarks regarding Gays in the last year; 85% of them believed leaders and other servicemembers tolerated such comments; and 37% of them said that they had witnessed or experienced an event of harassment toward a servicemember because of the servicemember's perceived sexual orientation. See Linda D. Kozaryn, "DoD Seels Public Views on Homosexual Harassment," American Forces Press Service, April 20, 2000. Many, if not all of Plaintiffs suffered such harassment, mistreatment, or abuse, including as alleged in the Complaint. This Plaintiff's command, for example, intentionally released his personal Privacy Act information to other servicemembers and a non-DoD civilian who had no need to know, in order to humiliate Plaintiff before he was discharged. Such "tarring and feathering" of Gay servicemembers before they are discharged is common in the military. And Gay servicemembers have no real remedy against such harassment and abuse, under § 654, because § 654 itself says that

Gays are harmful to unit cohesion, and because Gays are punished, *i.e.*, discharged, for reporting[1] illegal or wrongful actions against them, which makes them avoid reporting incidents in the first place.[2]

In fact, § 654 expressly provides for arbitrary action against Gay servicemembers. Commanders have virtually unfettered discretion as to if, how, and when they discharge a servicemember, regardless of the real and substantial harm to the servicemember such as loss of future employment, harm to reputation, invasion of privacy, and anguishing uncertainty. For example, under § 654, commanders have unfettered discretion to determine when a person found to be Gay is actually discharged; they can wait a year, they can wait four months, they can wait four weeks. One Plaintiff was retained for more than a year after being known as Gay by her command, as stated in the Complaint. Plaintiff was

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[1] Reporting under the military's Anti-Harassment Policy is useless, because most servicemembers, including commanders, are afraid to stand up for Gay servicemembers lest they be targeted themselves under the Policy. Plaintiff reported an instance where a civilian contractor bragged to soldiers about beating up Gays for fun, and the Army did nothing substantive about it and the contractor continued to work on post just as if nothing had happened. If that contractor had bragged about beating up Blacks for fun, there would have been hell to pay, and rightly so.

[2] One would think that reporting harassment or a crime against an individual, even on the basis of sexual orientation, would not be a problem, but, with § 654 it is, because commanders have almost unfettered discretion under the policy to determine what constitutes "evidence" of homosexuality, and the mere act of reporting harassment against Gays can and does lead to the belief by commanders that a servicemember is Gay.

retained for approximately four months, just long enough for his command to use his special expertise, even though Plaintiff was in a special administrative status (like many if not all Gay servicemembers facing discharge) in which he legally could not receive any favorable actions, such as awards or leave, during that four months. For another example, under § 654, commanders have virtually unfettered discretion to characterize a Gay servicemember's service at discharge, and commanders' prejudice against Gays usually negatively informs that characterization—whatever the excellence of the discharged servicemember's service was factually or as a matter of record. As an officer and a judge advocate, this Plaintiff often heard commanders expressly state that first-tour individuals being discharged under the policy were entitled to nothing more than a General Discharge.[3] A General Discharge can adversely affect a servicemember's later civilian employment opportunities, government benefits, and reputation.

In fact, as far as officers are concerned, the military still explicitly categorizes homosexual conduct, even the mere admission of homosexuality, as "misconduct," see Army Regulation 600-8-24, para. 4-22*b*(6); AR 135-175, thus allowing commanders to list the reason for an officer's discharge as "misconduct" on his or her DD 214 (the public record of his or her service)—even if the officer had a stellar career, and even if the military ultimately awards the officer an Honorable

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[3] See Complaint regarding Plaintiff Cook, whose commander tried to give him a General Discharge.

Discharge. This unfortunately happened to Plaintiff, or almost happened to him. Although Plaintiff figuratively performed miracles for the command from which he was discharged, and he had a spotless record, his command, at the direction of Headquarters Department of the Army ("HQDA") in Washington, initially indicated on Plaintiff's DD 214 that he was being discharged for "substandard performance," and then, after Plaintiff complained about that, indicated he was being discharged for actual "misconduct," simply because of his homosexual admission. It was not until SLDN intervened and contacted HQDA, that the reason for Plaintiff's discharge was changed to the Army's real reason for his discharge, "homosexual admission," but not before numerous individuals, including DoD civilians and enlisted clerks, had seen the prior defamatory entries. Only God knows what would have happened to Plaintiff's life had SLDN not successfully intervened.

In fact, § 654 allows the military to arbitrarily actually deny a Gay servicemember an Honorable Discharge, and give him or her a devastating Under Other Than Honorable (OTH) Conditions Discharge, merely for *publicly* engaging in affection with someone of the same sex, off-duty, and off-post, even though the same act of public affection would not otherwise be punishable for Straight servicemembers. See AR 600-8-24, para. 4-22*h*(4); AR 635-200, para. 15-4(*a*). For example, a Gay servicemember could be given an OTH merely for kissing his or her sweetheart on the mouth while in the street, off-duty and off-base—even if the servicemember is already known in his or her unit as

Gay and is pending discharge. Such punishing of "Gay" behavior *per se* is completely unrelated to any legitimate government interest and unconstitutional. See, *e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003). Nor is that some archaic provision. This Plaintiff witnessed a superior give a soldier pending discharge an instruction thus not to engage in public affection.

Thus, day in, and day out, § 654's arbitrary regime physically, financially, and personally harms Gay servicemembers even before they are discharged, and it is allowed to continue to do so because no court bothers to take complaints against it by Gay servicemembers seriously. Straight judges cannot even imagine that Gays are complaining about anything other than the fact of application of the law, since they cannot imagine that such egregious arbitrariness in operation could occur. How could they. As Straights, they never experience it, and could never be victimized by it. To them, it is perfectly neutral. And there are no channels through which they could hear complaints from Gays about such applied or operating harm and arbitrariness. There are certainly no channels to hear them through the military, which wants nothing to do with Gays and discharges them, nor through Congress who enacted § 654, nor through society which also generally ostracizes Gays. But hear these complaints courts must, since such arbitrary oppression is antithetical to the Constitution and our Democracy.

III. The Court Completely Missed Plaintiffs' Other First Amendment Claim

In the same fashion that it missed the equal protection claim, this Court also identified only part of Plaintiffs' First Amendment claim—that § 654 violates the First Amendment by proscribing statements by Gay servicemembers, or prescribing silence for Gay servicemembers, about their sexuality.[4] However, there is another First Amendment claim encompassed by the Complaint, which is that the § 654 regime is really and substantially overbroad and chills a whole range of protected speech that is unrelated to even the military's stated objective of maintaining unit cohesion. See, *e.g.*, Parker v. Levy, 417 U.S. 733, 760 (1971). Again, it is § 654's arbitrariness that causes the constitutional problem. Under § 654, a servicemember may be discharged not only for sexual contact or marriage/attempted marriage with someone of the same sex, or for an admission of homosexuality, but also for "any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in such [sexual] bodily contact," and also for any "language or behavior that a reasonable person would believe intends to convey the statement that a person engages in, attempts to engage in, has a propensity to engage in, or intends to engage in [such sexual bodily contact]. See AR 600-20, para. 4-19. In other

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[4] Of course, once § 654 is recognized as unconstitutional under equal protection and due process, this proscription/prescription is automatically unconstitutional under the First Amendment.

words, a servicemember may be discharged for anything that society stereotypes as "Gay." In light of the fact that individual commanders have virtually unfettered discretion to find that a servicemember is homosexual or has engaged in homosexual conduct (unless the servicemember has a certain number of years in, in which case a board makes that finding based on the commander's recommendation and "evidence"), the last two categories of qualification for discharge are open-ended and unreasonably cover an entire universe of language and behavior that might be stereotyped as "Gay,"[5] even if neutral and constitutionally protected. For example, commanders may use non-sexual, innocent hugging or touching between servicemembers of the same sex, flamboyancy, liking the "softer" things in life, supporting Gay rights, having a friend who is Gay, going to a bar frequented by Gays, possessing or reading Gay publications like *The Advocate*, or watching Gay-themed movies like *Brokeback Mountain* as *corroborating* (but not sole) evidence of homosexual conduct requiring or allowing discharge. See AR 600-20, para. 4-19*d*(2)(*a*); AR 600-8-24, para. 4-22*b*(2)(*e*); 635-200, para. 15-3*b*(2)(*c*).

Consequently, since, under § 654, *servicemembers* bear the burden of proving that they are not homosexual or have not engaged in homosexual conduct if they are ever so accused, suspected, or found by the command, both Gay and Straight servicemembers avoid any innocent or

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[5] In the military, as in society, one often hears Straights use, among themselves, the put-down, "That's so Gay."

neutral conduct that might even remotely invite suspicion as being "Gay" and trigger an investigation[6] into their sexuality or ultimately be used to support a finding of homosexuality. On its face, such avoidance behavior sounds almost silly or incredible, yet this Plaintiff can assure the Court that it is very real and occurs every day in the military. Gay servicemembers, or those servicemembers perceived to be Gay, are so mistreated in the military, and so vulnerable to the arbitrary loss of their employment and service, under § 654, that most servicemembers (Gay and Straight) do whatever is necessary to avoid becoming a victim of the policy—even if that means avoiding a whole range of normal, reasonable, beneficial, and neutral language and behavior that has nothing to do with *per se* homosexual expressive conduct (like saying "I am Gay," or saying "I love you" to someone of the same sex). And their fears are well-founded because, as Plaintiff said before, commanders and other servicemembers may and *do* evaluate an individual servicemember's sexuality based on Gay-stereotyped language and behavior. The only other situation to which this avoidance behavior could be compared, although certainly not even close to the same horrible degree, is how people in Nazi Germany and other Nazi-occupied countries often had to avoid language, behavior, appearances, or situations—however innocent—which might get them branded as Jewish (or another marked group, such as "Gypsies") by the Nazis and sent to

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[6] Commanders have virtually unlimited discretion as to how they pursue such investigations, which become modern-day witch-hunts.

concentration camps. The analogy is completely appropriate, though, in the sense that the military's and Congress', and indeed, society's discrimination against Gays is as unacceptable as anti-Semitism and proceeds from the same methodology and myth, and should be as equally rejected by the courts, including this Court.